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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY,

Appellant,

—v.—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF AMICUS CURIAE SUBMITTED ON BEHALF OF LONG ISLAND LIGHTING COMPANY AS PETITIONER IN 79-629

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BRIEF AMICUS CURIAE SUBMITTED ON BEHALF OF LONG ISLAND LIGHTING COMPANY AS PETITIONER IN 79-629

Interest of Amicus*

Long Island Lighting Company (LILCO) is an investor owned company engaged in the production and supply of natural gas and electricity to con-

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* A motion for leave to file this Brief Amicus Curiae has been filed with the Court.

sumers in Nassau and Suffolk counties, and a small portion of Queens County, in the State of New York. Prior to February 1977, LILCO utilized inserts in its utility bills to communicate with residents of Long Island on issues of public importance ranging from the availability of Federal Food Stamps to the advisability of nuclear power. The regulation of the New York State Public Service Commission at issue in this case directed LILCO to:

> ". . . discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of [LILCO's] position on controversial matters of public policy."

On May 6, 1977, LILCO commenced an action in the United States District Court for the Eastern District of New York seeking declaratory and injunctive relief against the Commission's ban on "controversial" bill inserts.[1] After permitting intervention pursuant to Rule 24(b) by several environmental groups opposing the use of bill inserts discussing nuclear power, the District Court, on March 30, 1979, upheld the constitutionality of the ban on controversial bill inserts but invalidated the ban on promotional advertising of electric heat. (A copy of the District Court's unreported opinion is reproduced as an Appendix to

[1] The Federal action, *Long Island Lighting Company v. New York State Public Service Commission*, 77 Civ. 972, challenged both the ban on "controversial" bill inserts and a related Commission ban on promotional advertising of electricity. This appeal involves only the bill insert issue. The promotional advertising issue is currently before this Court in *Central Hudson Gas & Electric Company v. Public Service Commission*, No. 79-565, appeal pending from 47 N.Y.2d 94, 417 N.Y.S.2d 30 (1979).

this brief.) Both sides appealed to the Second Circuit. Oral argument on both the bill insert issue and the promotional advertising issue was held before a panel of the Second Circuit on October 22, 1979.[2] After this Court noted probable jurisdiction in this case, LILCO, on October 15, 1979, lodged a petition for certiorari prior to judgment with this Court seeking a writ of certiorari on both the bill insert and promotional advertising issues.[3] On November 1, 1979, this Court denied LILCO's application for expedited consideration of its petition for certiorari. LILCO, thus, is directly interested in the outcome of this appeal both as a litigant in a closely related case and as a company subject to the identical restriction at issue herein. Since the restriction at issue in this case impinges directly upon the First Amendment rights of LILCO and LILCO's customers, LILCO submits this brief amicus curiae in the hope that it will prove of assistance to the Court in confronting the serious First Amendment issue raised by the Commission's attempt to act as a benevolent censor. The arguments raised by LILCO in opposition to the Commission's ban are fully applicable to and wholly supportive of Consolidated Edison Company's appeal herein.

[2] The appeals are docketed in the Second Circuit as 79-7374 and 79-7375.

[3] LILCO's petition for certiorari is docketed in this Court as 79-629. A related petition filed by the intervening environmental groups is docketed as 79-595.

Statement of the Case

On February 25, 1977, the New York State Public Service Commission ordered all public utilities in New York State to discontinue the use of bill inserts discussing controversial issues of public policy. Prior to the Commission's order, LILCO, in common with many other utilities in New York, had utilized bill inserts as an economical and effective method of communicating on a broad range of public issues related to its business. Most significantly for LILCO, bill inserts had been used to discuss the view of LILCO's management with respect to the economics and environmental risks of various alternative means of meeting the energy requirements of its customers, including nuclear power to replace the use of imported oil.

LILCO has used bill inserts of varying size and printing complexity. A single sheet bill insert costs approximately $5,000 to print, while more complex folding inserts of up to several sheets conveying a number of messages cost up to $15,000 to print. Since bill inserts do not cause an increase in postage, the sole costs attributable to inserts are printing costs; costs associated with writing and design; and insertion costs. LILCO recognizes that under current Commission rules all such costs must be borne solely by LILCO's shareholders. Accordingly, controversial bill inserts result in no out-of-pocket cost to the consuming public.

In contrast to the cost-efficient nature of bill inserts, modes of communication promising similar efficiency and coverage are far more expensive. The cost of delivering the same insert by house to house canvassing would be between $37,000-$47,000 per delivery. The average cost of a separate mailing to LILCO's customers would be between $84,500-$93,500 per mailing.

Whether the Commission may single out the most efficient and economical method of communicating information on a substantial public issue and seek to impose an absolute ban on its use is the issue posed by this appeal.[4]

Questions Presented

1. May the New York State Public Service Commission prohibit public utilities from utilizing bill inserts paid for by shareholders to disseminate information on controversial matters of public policy?

2. Is the ban on bill inserts discussing "controversial matters of public policy" void for vagueness?

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[4] The District Court engaged in an intensive investigation of factual issues surrounding the use of bill inserts. The data generated by the District Court's insistence upon a careful review of the facts is contained in the Joint Appendix submitted by the parties in the *LILCO* case in connection with the pending Second Circuit appeal. A copy of the Joint Appendix has been lodged with the clerk of the Court. The factual assertions contained in this Statement of the Case are drawn from material contained in the Joint Appendix.

ARGUMENT

I.

The Commission's Attempt to Impose an Absolute Ban on the Use of Bill Inserts Discussing "Controversial Matters of Public Policy" Violates LILCO's Right to Disseminate and the Public's Right to Receive Information on Current Issues of Public Concern.

A. Introductory Statement and Summary of Argument

The Commission has singled out the most convenient and economical method of communication open to LILCO and has banned it when the subject matter of the insert is "controversial". The ban on "controversial" bill inserts, thus, effects a significant reduction in the ability of LILCO to express itself on one of the most significant issues affecting the company and the Long Island community—the most economical and least environmentally damaging means of meeting the energy needs of its customers and reducing LILCO's current 100 per cent dependence upon foreign oil. The constitutionality of such a ban is, of course, hotly disputed by the parties. However, no dispute appears to exist between the parties as to three issues which form the contextual basis for considering the constitutionality of the ban on "controversial" bill inserts.

First, the parties are in agreement that LILCO's desire to disseminate information relevant to the making of informed decisions on issues of public policy is squarely within the protection of the First

Amendment. *First National Bank of Boston v. Belotti,* 435 U.S. 765 (1978). As this Court noted in *First National Bank,* the First Amendment protects communications as well as communicators; listeners as well as speakers. Since LILCO's proposed speech seeks to address current political and social issues of central importance, it falls at the core of the First Amendment. *Friedman v. Rogers,* 99 S.Ct. 887, 895, n.10 (1979).[5]

Second, the parties recognize that under current Commission guidelines, all out-of-pocket costs attributable to bill inserts discussing "controversial matters of public policy" must be borne solely by public util-

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[5] The principle that the right to know is a corollary of the right to speak has been vigorously asserted by this Court. E.g., Note, *The Right to Know in First Amendment Analysis,* 57 Texas L. Rev. 505 (1979). Indeed, the recognition that corporate and commercial speech is entitled to a degree of First Amendment protection reflects increased concern for the rights of hearers. E.g., *Bigelow v. Virginia,* 421 U.S. 809 (1975); *Virginia State Board of Pharmacy v. Virginia Citizens' Consumers Council,* 425 U.S. 748 (1976); *Linmark Associates v. Township of Willingboro,* 431 U.S. 85 (1977); *Carey v. Population Services, Inc.,* 431 U.S. 678 (1977); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *Friedman v. Rogers,* 99 S.Ct. 887 (1979). The explicit recognition by this Court that the First Amendment protects the right to receive information as well as the right to disseminate it dates from *Martin v. Struthers,* 319 U.S. 141 (1943), when this Court invalidated a flat ban on house to house canvassing because it interfered with the right of a willing householder to receive information. See also, *Lamont v. Postmaster General,* 381 U.S. 301 (1965); *Procunier v. Martinez,* 416 U.S. 396 (1974). No serious question exists concerning the standing of a speaker to raise the First Amendment rights of his putative listeners. E.g., *First National Bank of Boston v. Bellotti, supra.*

ity shareholders. Thus, the dissemination of "controversial" bill inserts cannot result in increased cost to the consuming public.

Finally, the parties are in agreement that bill inserts provide a highly effective method of communicating with a public utility's customers. Thus, in 1976, the Commission directed public utilities in New York State to use bill inserts rather than newspaper advertisements to notify consumers of prospective rate changes. See, *Petition of Consumer Protection Board,* N.Y.S. Public Service Commission Case 26972 at 5-6 (Aug. 10, 1976).

Despite the conceded application of the First Amendment to LILCO's speech; despite the willingness of LILCO to bear all costs attributable to its speech; and despite the Commission's recognition that bill inserts are a significant and effective medium of communication, the Commission has, nevertheless, insisted upon imposing an absolute ban on controversial bill inserts. The Commission seeks to justify its absolute ban by asserting two sets of objections to "controversial" bill inserts. First, the Commission argues under several rubrics that controversial bill inserts impinge upon the privacy interests of those who receive them.[6] Second, the Commission argues that a ban on controversial bill inserts is necessary to equalize speech resources and to prevent an unfair

[6] Among the privacy-based objections raised by the Commission are (1) protection against offensive messages; (2) protection of a captive audience; and (3) protection of the tranquility of the home. The inadequacy of the Commission's privacy-based objections are discussed *infra* at pp. 9-20.

subsidization of a utility's views. Given the paramount importance of First Amendment values, the Commission's objections to "controversial" bill inserts, taken separately or in combination, do not justify the Commission's absolute prohibition. Moreover, even if one were to assume the validity of one or more objections, the Commission's choice of an absolute prohibition is far more Draconian than necessary.

B. The Inadequacy of the Governmental Interests Proffered by the Commission in Defense of Its Absolute Prohibition

1. Privacy-Based Interests

Rather than adopting the traditional posture of encouraging the flow of information relevant to the functioning of a free society, the Commission argues that New Yorkers should be shielded from potentially upsetting controversial information with which they may disagree. Despite the fact that bill inserts do nothing more than express an idea and despite the fact that recipients are free to discard them unread, the Commission argues that New Yorkers must be protected against unwelcome ideas by banning them from utility billing envelopes. This Court has repeatedly rebuffed similar governmental attempts to insulate persons from the marketplace of ideas under amorphous notions of privacy.

(a) The Shielding of Persons from Ideas Which They Might Find Offensive

The Commission's primary stated justification for the banning of bill inserts is its desire to shield certain New Yorkers from ideas with which the Com-

mission assumes they disagree and would find offensive.[7] While such a motive for censorship is not new, it has been repeatedly rejected by this Court as in basic conflict with the First Amendment.

In *Street v. New York,* 394 U.S. 576 (1969), New York attempted to prosecute a defendant for uttering contemptuous words in public about the American flag. New York attempted to justify its suppression of speech contemptuous of the flag by arguing that defendant's words were deeply offensive to passers-by. However, Mr. Justice Harlan, writing for the Court, disposed of such a proffered state interest by noting:

> "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Id.* at 592.

Similarly, in *Cohen v. California,* 403 U.S. 15 (1971), this Court, once again speaking through Mr. Justice Harlan, declined to permit California to pros-

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[7] Thus, the Commission's February 25, 1977 Statement of Policy notes:

> ". . . we shall not permit advertising on matters of public controversy to be included in the printed material that often accompanies the mailing of consumer bills. We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject rate payers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism." *Statement of Policy* at pp. 10-11.

ecute a young man for appearing in a courtroom wearing a jacket emblazoned with an offensive slogan merely because persons involuntarily viewing the slogan were extremely likely to be offended by its vulgarity.

Mr. Justice Harlan's admonition that communication may not be suppressed in a free society merely because it may (or, as in the case of *Cohen,* would probably) be offensive to its hearers has been repeatedly heeded by this Court. In *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975), this Court declined to ban sexually explicit (but nonobscene) drive-in movies merely because they were visible and, presumably, offensive to many passers-by. In *Gooding v. Wilson,* 405 U.S. 518 (1972), this Court invalidated a Georgia statute on its face which was "susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments . . ." *Id.* at 520. In *Bachellar v. Maryland,* 397 U.S. 564 (1970), this Court unanimously reversed a disorderly conduct conviction because the record indicated that the conviction might have resulted merely because petitioners' views were offensive to some of their hearers. See also, *Rosenfeld v. New Jersey,* 408 U.S. 901 (1972); *Lewis v. New Orleans,* 408 U.S. 913 (1972); and *Brown v. Oklahoma,* 408 U.S. 914 (1972) (reversing convictions for "offensive" speech); *Lewis v. New Orleans,* 415 U.S. 130 (1974) (invalidating ban on offensive speech); *Plummer v. City of Columbus,* 414 U.S. 2 (1973) (reversing conviction for offensive speech under broadly worded statute); *Cason v. City of Columbus,* 409 U.S. 1053 (1972); *Karlan v. City of Cincinnati,* 416 U.S. 919 (1974); *Kelly v. Ohio,* 416 U.S. 923 (1974);

Rosen v. California, 416 U.S. 924 (1974) (reversing a series of convictions based on speech offensive to hearers). Finally, in *Spence v. Washington*, 418 U.S. 405 (1974), this Court returned to Mr. Justice Harlan's formulation in *Street* and reversed a conviction for placing a peace symbol on an American flag, despite Washington's assertion that such activity was extremely offensive to persons who viewed it.

This Court's consistent refusal to permit the State to suppress communication merely because the ideas conveyed might offend some hearers is not surprising. If speech may be suppressed merely because some listeners might find it offensive, only the lowest common denominator of communication would exist. Instead of the robust exchange of views, we would be consigned to a bland diet of platitudes. Thus, to the extent the ban on bill inserts is predicated on protecting certain hyper-sensitive hearers from ideas which they might find offensive, it is in clear violation of the First Amendment.

(b) The Protection of Privacy in the Home

The Commission will doubtless contend that its absolute ban on "controversial" bill inserts is not designed merely to shield persons from offensive ideas, but rather to guard the privacy of the home from the intrusion of unwelcome ideas. However, whatever power the State may possess to protect the tranquility of the home from inherently obtrusive or inherently "offensive" communications, it does not extend to the banning of core First Amendment activity which is deemed unwelcome merely because the recipient disagrees with the ideas expressed. While

the State may protect the privacy of the home against unduly obtrusive forms of communication and inherently offensive communication, it may not erect a barrier against communications directed to the home merely because they discuss controversial ideas. Thus, while the State may regulate sound trucks and blatantly offensive sexual pictorial matter in order to preserve the tranquility of the home, the State may not act to insulate the home from the realm of ideas. While a regulation controlling the delivery of an unsolicited, sexually explicit picture to one's home may well be constitutional, a regulation forbidding Republicans from mailing campaign literature to registered Democrats would violate the First Amendment. Compare, *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970) with *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

Moreover, even if one concedes a valid interest in protecting the privacy of the home against controversial ideas,[8] the decision as to whether a given communication is to be received at home is an individual decision which may not be pre-empted by even a benevolent censor.[9]

(i) The Commission May Not Impose a Ban on the House to House Dissemination of Communications Discussing Controversial Matters of Public Policy

This Court has recognized that no person should be a captive audience in her or his own home for

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[8] Amicus urges the Court to reject such a position as inconsistent with the notions of robust debate underlying the First Amendment.

[9] See, *infra*, pp. 17-20.

communications which because of their form and/or substance are inherently destructive of tranquility. E.g., *Rowan v. United States Post Office Department,* 397 U.S. 728 (1970). Thus, for example, the State undoubtedly possesses power to regulate certain methods of communication (such as sound trucks) which because of their form inexorably affect the tranquility of the home. E.g., *Saia v. New York,* 334 U.S. 558 (1948). Moreover, the State possesses limited power to regulate the home delivery of inherently offensive material, such as sexually explicit pictorial matter, which, while not obscene, is deeply disturbing to many persons. Compare, *Rowan v. United States Post Office Department,* 397 U.S. 728 (1970) with *Blount v. Rizzi,* 400 U.S. 410 (1971). However, it is a dramatic leap from the recognition of a limited capacity to regulate inherently obtrusive communication in the home to the broad power, asserted by the Commission, to ban non-offensive, minimally obtrusive communications merely because some recipients may disagree with the ideas they espouse. This Court has repeatedly recognized that when the content of the communication is not inherently offensive and where the form of the communication is not inherently obtrusive, the fact that a communication is delivered to a recipient's home does not strip it of constitutional protection. E.g., *Hynes v. Borough of Oradell,* 425 U.S. 610 (1976).

In *Hynes,* this Court struck down as unconstitutionally vague a licensing requirement directed at persons seeking to engage in house to house political canvassing. While the *Hynes* court recognized that door to door canvassing might be subject to appropriately narrow regulation because of the physical intrusion involved, the Court clearly held that house to house canvassing could not be absolutely prohibited. Similarly, the Commission lacks power to impose an absolute ban on the far less intrusive delivery of mail inserts at issue in this case, merely because they are directed to the home.

In recognizing that the delivery of non-offensive communications to the home in a non-obtrusive manner is protected by the First Amendment, the *Hynes* Court merely re-affirmed an ubroken line of precedent recognizing that house to house delivery of information is a significant First Amendment activity. Thus, in *Martin v. Struthers,* 319 U.S. 141 (1943), Mr. Justice Black phrased the issue in words particularly appropriate to the instant case:

> "For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants. . . . Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants. The question to be decided is whether the City, consistently with the federal Constitution's guarantee of free speech and press, possesses this power." 319 U.S. at 141-142.

In holding an absolute ban on door to door communication invalid, Mr. Justice Black, writing for the Court, noted:

> "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." 319 U.S. at 146-147.

In both *Schneider v. State,* 308 U.S. 147 (1939) and *Cantwell v. Connecticut,* 310 U.S. 296 (1940), this Court reversed convictions arising out of house to house First Amendment activity. See also, *Thomas v. Collins,* 323 U.S. 516 (1945); *Lovell v. Griffin,* 303 U.S. 444 (1938).

In each of the door to door cases from *Schneider* to *Martin* to *Hynes,* the physical presence of the canvasser in the doorway of a private home constituted a far greater intrusion and threat to privacy than does the insert in an envelope which the Commission seeks to ban. If, as *Hynes* and *Martin v. Struthers* make clear, LILCO would be constitutionally free to engage in a house to house canvass to deliver its message, it defies reason to suggest that the Commission may, in the guise of protecting privacy, prohibit LILCO from delivering the identical message by using the less intrusive and more economical method of mail inserts.

Just as the recipient of a house to house canvass in *Hynes* or *Martin* may decline to receive or to read a leaflet, so the recipients of LILCO's inserts are free to discard them unread. Indeed, the ability of an unwilling recipient to ignore the mail insert at issue in this case is substantially greater than the ability to ignore a physical presence in the doorway.[10] Thus, the Commission's attempt to justify its ban on mail inserts as a device to protect the privacy of the home from unwelcome ideas must fail.

(ii) The Commission May Not Interfere With the Right of Willing Recipients to Receive Information on Controversial Matters of Public Policy

In banning "controversial" mail inserts, the Commission has, in the words of Mr. Justice Black in *Martin v. Struthers, supra,* attempted to decide for the entire community whether individuals within that community may receive the information in question. Even if one assumes that a valid governmental interest exists in insulating persons from inoffensive and nonobtrusive communications with which they disagree, the decision to insulate must remain an individual decision which may not be imposed upon the entire population. Even if individual members of the community might be empowered to cut themselves off from unwelcome ideas, the Commission lacks the

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[10] Unlike the matter at issue in *Rowan v. United States Post Office,* 397 U.S. 728 (1970), the mail inserts disseminated by LILCO are neither inherently offensive nor unduly obtrusive. While a recipient of sexually explicit pictorial matter in the mail may find it impossible to avoid being confronted with an offensive message, the recipient of a mail insert discussing the merits of important, but controversial issues, e.g. nuclear power need merely refrain from reading the insert to avoid any contact with unwelcome ideas.

power to decide, in advance, that all New Yorkers do not wish to receive the information at issue in this case. Thus, even if one assumes that *Rowan v. United States Post Office,* 397 U.S. 728 (1970) applies not merely to inherently offensive communications but to core First Amendment material as well, the Commission's order cannot withstand constitutional scrutiny. In *Rowan,* this Court upheld the constitutionality of a statute which permitted the addressee of sexually oriented (but non-obscene) mailings to require that her or his name be removed from future mailing lists. The heart of the *Rowan* decision was the choice it permitted each individual addressee to make his own decision whether to receive future mailings. *Rowan* is, thus, merely a logical application of Mr. Justice Black's insistence in *Martin v. Struthers, supra,* that the decision whether to receive information in the home is the sole province of the individual. The Commission's attempt to pre-empt that individual decision by imposing a blanket prohibition on all controversial bill inserts is its most glaring constitutional error.

In *Lamont v. Postmaster General,* 381 U.S. 301 (1965), this Court invalidated a postal regulation which required the addressee of "communist propaganda" to affirmatively request its delivery. The ostensible purpose of the regulation invalidated in *Lamont* was to shield addressees from unwanted "offensive" mail. However, the *Lamont* court held that by requiring an affirmative request prior to delivery, the regulation imposed an unconstitutional restraint on the public's right to know. The Commission's total ban on controversial mail inserts appears

to be even more objectionable than the partial restraint struck down in *Lamont.* See also, *Blount v. Rizzi,* 400 U.S. 410 (1971) (invalidating an attempt to vest the Postmaster General with powers similar to that accorded individual addressees in *Rowan*).

The distinction between an individual choice to cease receiving mailed matter and a governmentally imposed prohibition similar to the Commission's flat ban has been recognized by numerous lower courts. Thus, in *United States v. Treatman,* 408 F. Supp. 944 (C.D. Cal. 1976), the District Court ruled that while individuals could prevent unwelcome mailings of sexually explicit (non-obscene) material to themselves, the government lacked power to block the mailing of constitutionally protected material to persons who had not explicitly demanded that the mailings be terminated. In *Bolles v. People,* 541 P.2d 80 (1975) (Colo.), the Supreme Court of Colorado recognized that the mailing of pictorial matter opposing abortion was protected by the First Amendment in the absence of individual requests to be removed from the mailing list. Finally, in *Van Nuys Publishing Co. v. City of Thousand Oaks,* 97 Cal. Rptr. 777, 489 P.2d 809 (1971), the Supreme Court of California struck down an ordinance barring house to house canvassing, holding:

> "The ordinance . . . goes considerably beyond a homeowner's individual choice, since it prohibits distribution to those occupants who have raised no objection as well as to those who have." 489 P.2d at 814.

The Commission's ban similarly goes considerably beyond individual choice, since it prohibits dissemina-

tion of controversial bill inserts to all persons, not merely to persons who have explicitly requested that they not receive the material. As Mr. Justice Black noted in *Martin v. Struthers, supra,* such a stringent, overly broad ban is not a legitimate tool for the protection of privacy; but rather a "naked restriction of the dissemination of ideas." 319 U.S. at 147.

2. Equality-Based Interests

The Commission, apparently recognizing that the privacy-based justifications set forth in its initial *Statement of Policy* are of doubtful constitutional validity, also seeks to justify the absolute ban on controversial bill inserts as a device to prevent public utilities from gaining an unfair advantage in disseminating their views. In effect, the Commission has chosen to seek to "equalize" speech resources by denying one speaker access to an effective method of communication.

(a) Equalization of Speech Resources

It has, recently, become fashionable to tamper with our traditional free market in ideas in the hope of assuring that all points of view enjoy equal access to the marketplace. Thus, in recent years, states have experimented with statutes granting a right of reply to press attacks,[11] the Federal government has experimented with controls on political expenditures and

[11] E.g., Miss. Code Ann. § 23-3-35 (1972) (Mississippi); Florida Statute § 104.38. See also, § 61 Nev. Rev. Stat. § 6826 (1912) repealed, ch. 310, § 10, Nev. Stat. 554 (1969). See generally, *Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241 (1974).

contributions[12] and the Federal Communications Commission has experimented with access to the electronic media.[13] In each context, an alleged imbalance in the marketplace of ideas was subject to correction by two potential contrasting approaches—amplification of the "weak" voices or suppression of the "strong" ones. In each context, both the regulatory bodies and the Courts have recognized that, to the extent any tampering with the marketplace is constitutional at all, it must take the form of "amplification" rather than "suppression."

Thus, in the context of press-reply statutes and access to electronic media, no suggestion was even advanced that the media refrain from speaking; merely that an attacked party be given a forum for response or that alternative views be permitted an airing.[14]

In the campaign finance area, however, the initial response of Congress was similar to the Commission's approach herein. Confronted with a purported imbal-

[12] *Buckley v. Valeo,* 424 U.S. 1 (1976).

[13] *Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94 (1973); *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367 (1969). See also, *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974). (No right of access to municipal transit advertising.) See also, *Midwest Video Corp. v. F.C.C.,* 99 S.Ct. 1435 (1979).

[14] As *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974) and *Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94 (1973) demonstrate, the "amplification" device is, itself, often impermissible. Since the Commission has not attempted such an "amplification" approach, amicus suggests that it would be premature to consider its legality in depth at this time. See, *infra,* at pp 33-36.

ance in the ability to communicate during an election campaign, Congress singled out the "strong" voices and sought to redress the imbalance by muting them.[15] In invalidating the imposition of expenditure ceilings in political campaigns, this Court emphatically rejected the notion that speech imbalance may be redressed by imposing direct restraints on communication. Thus, the *Buckley* court held:

> "It is argued . . . that an ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by § 608(3)1's expenditure ceiling. *But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,* which was designed 'to secure "the widest possible dissemination of information from diverse and antagonistic sources" and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"'." *Id.* at 48-49. (Emphasis added.)

[15] Specifically, Congress sought to restrict the amount which an individual or candidate might expend on a given election campaign. The expenditure limitations were explicitly predicated on a desire to "equalize" the ability to communicate during the campaign process. Thus, this Court noted in *Buckley:*

> Although the Act does not focus on the ideas expressed by persons or groups subjected to its regulations, it is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups. *Buckley v. Valeo,* 424 U.S. 1, 17 (1976).

See also, *Id.* at 49 n. 55, at which the *Buckley* court notes:

> "Neither the voting rights cases nor the Court's decisions upholding the Federal Communication Commission's fairness doctrine, lends support to appellees' position that the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society."

Thus, to the extent the Commission seeks to uphold the direct restraint upon LILCO's speech "in order to enhance the relative voice of other segments of our society", it is in clear violation of the First Amendment. Whatever power the Commission may have to "amplify" what it perceives as weak voices, *Buckley* renders it clear that the Commission may not pursue its policy of "equalizing" speech by suppressing what it perceives as "strong" ones.

(b) Avoidance of a Forced Subsidy

It is conceded that under current Commission regulations all expenses fairly attributable to the use of "controversial" bill inserts must be borne by shareholders rather than rate payers.[16] Moreover, it is con-

[16] In the Second Circuit, the Commission launched a curious argument that its historic insistence upon distinguishing between "above the line" expenses, which qualify in computing future rates, and "below the line" expenses, which do not, is a meaningless exercise. The Commission argued that even "below the line" expenses may eventually have an impact upon future rate making, since they restrict the ability of shareholders to

ceded that the Commission may allocate salary and related expenses attributable to the use of bill inserts to shareholders rather than rate payers. Finally, it is conceded that bill inserts do not increase postage charges or result in any other increase in the cost of the billing process. Despite LILCO's willingness to bear all economic costs causally related to the use of bill inserts, the Commission asserts that the use of bill inserts would force dissenting consumers to subsidize the dissemination of views with which they vigorously disagree. However, given LILCO's willingness to absorb the cost of bill inserts, no forced subsidy exists. Moreover, even if a subsidy existed (it does not), it is a constitutional non-sequitur to suggest that the existence of a dissenting minority requires the cessation of all speech with which they disagree.

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earn the return to which the Commission has said they are entitled. Such a concern has not previously inhibited the Commission from charging certain expenses, such as lobbying, to shareholders when it deems it appropriate. The answer to the Commission's highly self-critical attack on its historic basis for rate regulation is twofold. First while the existence of enormous "below the line" expenses might seriously affect the rights of shareholders, the relatively small sums involved in this case cannot possibly affect future rate making computations. Second, the Commission's argument proves far too much. If one takes the Commission seriously, rate payers ultimately pay for all of LILCO's speech, not merely bill inserts. Accordingly, under the Commission's rationale, LILCO would not be permitted to engage in any First Amendment activity. Not even the Commission urges such a result. Accordingly, the current Commission structure which disqualifies controversial bill insert expenses in rate making computations is an effective method of assuring that shareholders, not rate payers, pay for "controversial" bill inserts.

(i) There is No Forced Subsidy Inherent in the Use of Bill Inserts

Given the fact that bill inserts impose no additional economic burden on LILCO rate payers, the Commission appears to concede that the traditional form of forced subsidy—involving a compelled payment of money—is not present. Instead, the Commission seeks to stretch the salutory rule against state-imposed forced subsidies to include situations where no economic detriment exists, but a cost-free indirect benefit accrues to a speaker. Such an attempt to launch courts on a limitless search for indirect benefits or "free rides" devoid of economic consequence is supported by neither precedent nor policy.

LILCO has no quarrel with the proposition that the state may not compel any person to subsidize political activity with which he or she disagrees. *Abood v. District Board of Education*, 431 U.S. 209 (1977). A similar principle has long insulated Americans from being required by the state to subsidize religious activities. E.g., *Flast v. Cohen*, 392 U.S. 83 (1968). However, no case has ever found a forbidden subsidy in the absence of a tangible out of pocket cost to the complaining party. Nevertheless, the Commission urges this Court to recognize a forced subsidy in the absence of economic cost on the basis of "intangible" benefit. A moment's reflection reveals the danger to a robust First Amendment inherent in the expanded vision of subsidy urged by the Commission. Under such a standard, no aggregate entity would ever be free to speak since dissenting members of the entity would be deemed to have intangibly subsidized the speech. For example, tax exempt

organizations would not be free to engage in First Amendment activity, since dissenting taxpayers would have indirectly subsidized the speech. Similarly, O.E.O. anti-poverty agencies, which receive their funds from the government, would not be permitted to speak, since dissenting taxpayers would be subsidizing the speech. Finally, in the context of *Abood,* volunteers would not be permitted to assemble at union headquarters to use typewriters and mimeograph facilities, since dissenting members would have "subsidized" the purchase of the equipment. Thus, a requirement that a causal connection exist between an alleged subsidy and a net economic cost is necessary to prevent the concept of forced subsidy from threatening the robust exercise of First Amendment rights. Indeed, in the related area of the Establishment Clause, this Court has rejected the notion that all aid to a religious institution constitutes a forbidden forced subsidy. Thus, in *Walz v. Tax Commission,* 397 U.S. 664 (1970), this Court rejected the argument that the grant of tax exemptions to religious organizations forced dissenting taxpayers to "subsidize" religion in violation of the Establishment Clause. In *Walz,* the concept of forced subsidy was rejected despite the arguable existence of a tangible out of pocket cost. In this case, where no tangible out of pocket cost exists, it is even clearer that a search for indirect or intangible subsidies would improperly entangle courts in sensitive areas of free expression.

While *Abood* stands as a laudable protection against forced out-of-pocket subsidies, the Commission's attempt to invite courts to use *Abood* to censor speech under the vague and amorphous standard of "indirect benefit" is unacceptable.[17]

(ii) Enforced Silence Is Not the Remedy for a Forced Subsidy

LILCO vigorously disputes the existence of any subsidy in connection with the bill insert process. However, even if one assumes *arguendo* that a form of intangible subsidy exists, it does not follow that LILCO must refrain from using bill inserts. It is a constitutional non-sequitur to argue that because a minority objects to a forced subsidy, the majority must be deprived of the speech in question. As even the Commission concedes, it is obliged to adopt the least drastic remedy. Obviously, a flat ban on the speech in question is not the least drastic remedy.

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[17] An additional basis for rejecting the forced subsidy theory is the fact that the forced subsidy cases inevitably involve state action. Private entities cannot impose a forced subsidy in violation of the First Amendment. *The Civil Rights Cases,* 109 U.S. 3 (1883). This Court has carefully distinguished between privately owned utilities, such as LILCO, the actions of which are not deemed "state action", and publicly owned utilities. Compare, *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974) with *Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1 (1978).

Moreover, the Commission's attempt to finesse the state action problem by arguing that Commission toleration of bill inserts would constitute state action is unavailing. The assumption that LILCO uses bill inserts only because the Commission permits it to begs the very constitutional question at issue in this case. If the First Amendment protects LILCO's use of bill inserts, the Commission's redundant "permission" does not translate into state action. This Court has now made clear that mere state authorization of an activity does not render its performance "state action." *Flagg Bros. v. Brooks,* 98 S.Ct. 1729 (1978).

As with the privacy-based objections discussed *supra* at pp. 9-20, the Commission does not appear genuinely concerned with eliminating the (non-existent) subsidy. Rather, the Commission seems bent on using the alleged existence of subsidy-based or privacy-based objections to justify blanket suppression of the speech in question. Instead of proposing narrowly tailored remedies designed to protect the interests of the dissenting minority, the Commission seeks improperly to use the alleged interests of dissenting rate payers to justify a cut-off of speech to all.

C. The Absolute Ban on Controversial Bill Inserts May Not Be Justified By the Commission's Desire to Avoid Administrative Inconvenience Caused By the Possible Emergence of a Public Forum

The District Court in the LILCO case quite properly declined to hold that the privacy-based and equality-based interests discussed *supra* justified an absolute ban on controversial inserts. Instead, the District Court elected to rest its approval of the insert ban on the Commission's apparent desire to prevent the emergence of a public forum in the bill insert process—with its concomitant administrative complexities. In effect, therefore, the District Court permitted the Commission to ban bill inserts because the Commission is unwilling or unable to confront the problems of administering an arguably public forum. Such an "administrative convenience" rationale for an absolute prohibition on controversial bill inserts must be rejected on at least two levels. First, use of "controversial" bill inserts would not create a public forum in the billing process and,

thus, would not give rise to an obligation to provide access to the billing mechanism to opposing groups.[18] Second, and more importantly for the purposes of this appeal, even if continued use of bill inserts would result in the emergence of a public forum, the Commission may not silence LILCO merely to avoid the inconvenience of administering a public forum.

(1) The Commission May Not Suppress Speech to Prevent the Emergence of a Public Forum

The District Court relied upon *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974) as sole authority for the proposition that the government, in order to prevent emergence of a public forum, may forbid a property owner from using his property to express an idea. However, far from justifying the Commission's absolute ban, *Lehman* demonstrates its invalidity. In *Lehman,* a transit system declined to permit its property to be used to display political advertising, despite having routinely accepted commercial displays. Plaintiffs unsuccessfully argued that by accepting commercial displays, the transit system had obligated itself to accept political advertising as well. *Lehman* involved an unsuccessful attempt by a puta-

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[18] The Commission has never taken a position on whether use of bill inserts by public utilities creates a public forum with a right of shared access. Rather than confront such a concededly difficult issue, the Commission has chosen to ban "controversial" bill inserts altogether. Since the Commission has never seriously considered a shared access plan involving bill inserts, the extent to which the First Amendment compels or precludes such a plan is beyond the scope of this appeal. This issue is preliminarily addressed *infra.*

tive speaker to compel an *unwilling* property owner to permit its premises to be used for speech. In holding that the First Amendment rights of the putative speaker do not override the traditional property interest of the unwilling defendant, the plurality in *Lehman* sounded a familiar theme of this Court. E.g., *Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94 (1973); *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972). See also, *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974); *Wooley v. Maynard,* 430 U.S. 705 (1977). However, in the present case, the putative speaker *is* the property owner. No case can be cited for the proposition that the state may forbid a *willing* property owner from using its property to express ideas merely because expression may cause the emergence of a public forum. Indeed, this Court has repeatedly held that when a *willing* property owner wishes to devote its property to a communicative use, the State is precluded by both the First and the Fourteenth Amendments from imposing absolute prohibitions on the speech in question. E.g., *Spence v. Washington,* 418 U.S. 405 (1974) (communicative use of privately owned flag protected); *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977) (For sale sign on private property protected); *First National Bank of Boston v. Bellotti, 435* U.S. 765 (1978) (use of corporate property to express ideas protected); *Buckley v. Valeo,* 424 U.S. 1 (1976) (use of private funds protected). While *Lehman* may fairly be cited for the proposition that an *unwilling* property owner may not be required to act as a conscript speaker, it cannot stand as authority for the proposition that a *willing* property owner may be forbidden to speak. Thus, even if the use of bill inserts were to

pose an increased administrative burden for the Commission, the First Amendment forbids the Commission from silencing LILCO merely because the Commission is unable or unwilling to cope with the task of administering a public forum.

(2) The Use of Bill Inserts Would Not Create a Public Forum

Strictly speaking, the question of whether the use of bill inserts would create a public forum entitling third persons to insist upon shared access to the billing process is not before the Court. Nevertheless, the District Court's decision assumed that continued use of bill inserts by public utilities might give rise to an enforceable right to shared access to the bill insert process. As LILCO has argued, even if such an assumption were correct, it cannot justify a total ban on controversial bill inserts. Accordingly, the Court of Appeal's decision upholding the total ban may (and should) be reversed without the necessity of deciding the public forum-shared access issue. Despite the failure of the Commission to have considered the question, the Court, nevertheless, may be urged to issue an advisory dictum directing that a variant of the "fairness doctrine" be applied to bill inserts. The shared access question is, however, not ripe for judicial consideration. Moreover, serious factual issues exist which must be resolved as a pre-condition to considering the imposition of shared access. Finally, as a matter of law, the Commission lacks the power to order a public utility to disseminate a "controversial" message with which it disagrees.

(i) The Shared Access Issue Is Not Ripe for Adjudication

The Commission has never considered the extremely complex and difficult issue of the extent to which doctrines evolved in the context of the electronic media should apply to communications by public utilities. In recent years, attempts to expand notions of equal time and shared access have been firmly rejected by this Court. E.g. *Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241 (1974) (right of reply statute unconstitutional); *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974) (no right of access to municipal transit advertising); *Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94 (1973) (no right to buy commercial time); *Buckley v. Valeo,* 424 U.S. 1 (1976). See also, *Midwest Video Corp. v. F.C.C.,* 99 S.Ct. 1435 (1979). Given the recent decisions of this Court, serious doubt exists whether the Commission would possess the power to impose a form of shared access upon LILCO. However, no doubt exists that if such a drastic step is contemplated, proper procedure calls for the issue to be presented initially to the Commission, with judicial review occurring only *after* the Commission has acted or failed to act. Only a proceeding before the Commission is calculated to develop the factual issues and identify the conflicting policy factors which must be weighed, both by the Commission and by a reviewing Court. If this Court strikes down the absolute ban on bill inserts, the Commission will doubtless consider the question of shared access. Until the Commission is encouraged to deal initially with the matter and to formulate an administrative position, it would be unwisely premature and jurisdictionally questionable for this Court to consider the issue.[19]

(ii) Substantial Doubt Exists as to the Power of the Commission to Impose Shared Access

Although it is premature to speculate on the legal merits of a shared access plan which the Commission has never even considered—much less promulgated—serious doubt exists as to whether the government may require LILCO to use its property to disseminate views with which it profoundly disagrees. In *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), this Court invalidated an attempt to require the only newspaper in town to print a reply to an editorial attack on a given individual. As the Court noted, the First Amendment bars the State from requiring individuals to disseminate material with which they disagree. In *Wooley v. Maynard,* 430 U.S. 705 (1977), Chief Justice Burger noted that "the right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind'". [Citing *Board of Education v. Barnette,* 319 U.S. 624, 637 (1943).] Where, as here, the resources of a private company would be commandeered by the State in order to compel the dissemination of a message with which the private party disagrees, the

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[19] Until the Commission acts, any speculation by this Court concerning shared access might well constitute an advisory opinion beyond the Article III jurisdiction of the Court. Moreover, whatever the Article III power of the Court, it is scarcely a novel proposition that difficult issues of constitutional magnitude should be determined only when necessary to resolve an actual case or controversy.

most profound issues of "freedom of mind" arise. Indeed, a forbidden subsidy, which the Commission so roundly deplores, would be imposed in its most blatant form, since LILCO would, in effect, be required to subsidize its opponents' messages by including them in its billing process. Cf. *Abood v. District Board of Education*, 431 U.S. 209 (1977). In the absence of the special circumstances created by the electronic media, this Court has studiously avoided any expansion of the principle of forced access. E.g., *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973). The caution demonstrated by this Court in *Tornillo* and *Lehman* together with this Court's unequivocal direction in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) that public utilities are to be treated as private rather than state entities, raise serious doubts concerning the Commission's power to order shared access to LILCO's billing envelopes. The resolution of those doubts should await a proper case or controversy.

D. ***The Absolute Ban on "Controversial" Bill Inserts May Not Be Upheld as a "Time, Place or Manner" Restriction on Speech.***

Although candidly noting that precedent does not fully support the position, the District Court and the Commission have struggled heroically to justify the Commission's ban on controversial bill inserts as a permissible "time, place or manner" restriction on First Amendment activity. The obvious discomfort felt by the District Court in seeking to apply "time, place or manner" analysis to the Commission's con-

tent defined ban is understandable, since no case has ever sustained an absolute content-based prohibition on a significant mode of communication as a mere "time, place or manner" restriction. Instead, the "time, place or manner" analysis has been used to regulate the inevitable collision between substantial state interests and certain modes of speech which involve broad elements of non-verbal activity.

All communicative activity, verbal as well as non-verbal, may be viewed as a two-step process consisting, first, of the transmission of an idea and, second, of the generation of non-communication related by-products. Thus, for example, picketing or demonstrating are two-step processes involving both idea transmission and the physical occupation of space. Since the non-communication related by-product of certain modes of speech (often described as communicative conduct) is substantial, the "time, place or manner" analysis has provided the state with a framework within which to regulate the non-communication related by-products of certain modes of speech. Thus, picketing, demonstrating and other forms of conduct-related communication are subject to substantial governmental regulation under the rubric of "time, place or manner" in order to police the inevitable collision between certain non-communication-related by-products of the communicative conduct and substantial governmental interests, such as free passage through the streets. However, certain other modes of speech (often called "pure speech") generate no by-products apart from the transmission of an idea. When such "pure speech" modes are used, the state is not free to use the "time, place or manner" doctrine to seek to regulate the communication-related

aspects of the process. Thus, where an act of communication does nothing more than transmit an idea, the state may not, under the guise of a "time, place or manner" restriction, seek to prohibit it. The transmission of an insert in an envelope is a pure communicative exercise. It generates no non-communication related by-products.[20] Thus, while the state may, if it wishes, seek to justify a ban on LILCO's communication under traditional First Amendment doctrine, it may not seek to regulate the communicative aspect of LILCO's speech as a mere "time, place or manner" restriction.

Moreover, even if "time, place or manner" were applicable to content-based regulations, the doctrine has never been used to impose an absolute prohibition upon a significant method of communication. A speaker's choice of the mode of communication is entitled to First Amendment protection. E.g., *Street v. New York*, 394 U.S. 576 (1969); *Cohen v. California*, 403 U.S. 15 (1971). Just as a city would not be empowered to place an absolute ban on "controversial" street demonstrations under the rubric of a "time, place or manner" restriction, so the Commission may not impose an absolute ban on "controversial" bill inserts. As Mr. Justice Harlan noted in both *Street* and *Cohen*, a speaker's choice of the means of communication is fully as protected against government interference as is the substantive content of the message. So long as the method of communication

[20] One possible non-communication related impact of a bill insert is the pre-emption of limited space which might be used for other messages. As LILCO has noted, it would have no quarrel with a regulation establishing space utilization priorities.

does not involve physical by-products which threaten substantial governmental interests, the choice of the medium is as protected as the content of the message.

II.

The Commission's attempt to ban inserts discussing "controversial matters of public policy" while encouraging inserts providing "non-controversial" and "useful" information is unconstitutionally vague.

This Court has consistently ruled that whenever the State seeks to regulate expressive activity, it must act with a high degree of precision. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785 n.21. See generally, Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960). Thus, the Commission's use of the vague and amorphous standard of "controversial" in its attempt to regulate LILCO's speech poses three problems of constitutional dimensions.

A. *The Commission's Standard Fails to Give Adequate Notice of the Scope of Its Proscription*

First, by utilizing vague standards, the Commission has failed to provide adequate notice to affected parties of the scope of the Commission's proscription.

In *Connally v. General Construction Company*, 269 U.S. 385 (1926), this Court reversed a conviction for failing to pay the "current rate of per diem wages in the locality where the work is performed." In holding the statutory standard unconstitutionally vague, this Court stated:

> "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Id.* at 391.

In *Lanzetta v. New Jersey,* 306 U.S. 451 (1939), this Court reversed a conviction under a statute which forbade persons to be "racketeers," holding:

> "No one may be required at peril of life, liberty or property to speculate at the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Id.* at 453.

Finally, most recently, in *Smith v. Goguen,* 415 U.S. 566 (1974), this Court invalidated a Massachusetts statute which prohibited "contemptuous" treatment of an American flag, as void for vagueness because it failed to provide adequate notice of the proscribed behavior. As Mr. Justice Powell noted in *Goguen,* "what is contemptuous to one man may be a work of art to another."[21] *Id.* at 573.

The standard of "controversiality" adopted by the Commission in this case is even less calculated to

[21] Quoting from Note, 66 Mich. L. Rev. 1040, 1056 (1968). Mr. Justice Powell obviously did not believe that wearing a flag patch on the seat of one's pants was a work of art. However, the phrase illustrates the essentially subjective nature of "contemptuousness". It would be a fair paraphrase of Mr. Justice Powell to note that what is controversial to one man may be revealed truth to another.

give notice of what it actually forbids than were the three standards invalidated in *Connally, Lanzetta* and *Goguen.* Accordingly, the Commission's regulation is unconstitutional. See also, *Hynes v. Borough of Oradell,* 425 U.S. 610 (1976).

B. ***The Vagueness Inherent in the Commission's Standard Will Deter Persons From Engaging in Constitutionally Protected Communication***

The existence of a vague prohibition on communicative activity inevitably acts to chill expression which persons fear *may* fall within the prohibition. Thus, vague prohibitions in the area of the First Amendment create an intolerable degree of self-censorship on the part of persons who tailor their activity to avoid violating a possible construction of the vague prohibition.

In *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), this Court invalidated New York's Feinberg Law which mandated removal of teachers for (a) "treasonable or seditious" utterance or (b) for "wilfully and deliberately advocat[ing], advis[ing], or teach[ing] the doctrine of forceful overthrow of the government." In declaring New York's standards unconstitutionally vague, this Court noted:

> "We emphasize once again that 'precision of regulation must be the touchstone in an area so closely touching our most precious freedoms;' [f]or standards of permissible statutory vagueness are strict in the area of free expression . . . Because First Amendment freedoms need breathing space to survive, government may regulate

in the area only with narrow specificity. New York's complicated and intricate scheme plainly violates that standard. When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone." 385 U.S. at 603-604.

See also, e.g., *NAACP v. Button,* 371 U.S. 415 (1963); *Speiser v. Randall,* 357 U.S. 513 (1958); *Cramp v. Board of Public Instruction,* 368 U.S. 278 (1961); *Baggett v. Bullitt,* 377 U.S. 360 (1964).

The standard of "controversiality" imposed by the Commission is even more objectionable than the "treasonable or seditious utterance" standard found wanting in *Keyishian.* Given the very drastic sanctions which may flow from a violation of the Commission's order, affected persons will doubtless "steer far wider of the unlawful zone". Far from permitting First Amendment breathing space, the Commission's standards virtually compel a wide ranging and intolerable self-censorship.

C. *The Commission's Standard Vests Overbroad Discretion in Government Officials to Regulate the Content of Public Discourse*

The failure of the Commission's prohibition to provide adequate notice of the scope of its proscription and the inevitable self-censorship in doubtful cases which a vague proscription engenders both focus on the impact of a vague regulation on a potential speaker. However, a vague speech regulation affects the regulator as well as the speaker. This Court has recognized that a third major vice of a vague speech regulation is the overbroad discretion which such a

regulation vests in petty officials to determine whether a given communication is covered by the regulation in question. *Hynes v. Borough of Oradell,* 425 U.S. 610 (1976). In effect, a vague regulation in the First Amendment area turns the official charged with responsibility for enforcing it into a discretionary censor.

In *Hynes v. Borough of Oradell,* 425 U.S. 610 (1976), this Court invalidated a regulation of house to house canvassing because it provided overbroad discretion to local officials. In *Hynes,* the regulation required advance written notice to local police by "any person desiring to canvass, solicit or call from house to house for a recognized charitable . . . or political campaign or cause." After recognizing that the ordinance failed to afford sufficient notice of the scope of its proscription, Chief Justice Burger, writing for the Court, noted:

> "Nor does the ordinance provide explicit standards for those who apply it. [Quoting from *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972)]. To the extent that these ambiguities . . . give police the *effective* power to grant or deny permission to canvass for political causes, the Ordinance suffers in its practical effect from the vice condemned in *Lovell, Schneider, Cantwell* and *Staub.* See also, *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972); *Coates v. Cincinnati,* 402 U.S. 611, 614 (1974)." 425 U.S. at 622 (emphasis in original).

In *Smith v. Goguen,* 415 U.S. 566 (1974), this Court invalidated a Massachusetts statute prohibiting

contemptuous flag usage. After noting the failure of the statute to warn persons of the scope of its proscription, Mr. Justice Powell, writing for the Court, stated

> "Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections.
>
> . . .
>
> Where inherently vague statutory language permits . . . selective law enforcement, there is a denial of due process." 415 U.S. at 575-576.

Given the essentially subjective nature of whether a particular communication is or is not "controversial", the Commission's standard vests more discretion in the Commission than the overly broad discretion condemned as excessive in *Hynes* and *Goguen*.

In an attempt to save its overly vague regulation, the Commission has offered to issue advance rulings on whether a proposed leaflet is or is not "controversial". Far from saving the regulation, the Commission's offer merely highlights one of its principal vices. The obvious discretion which such a procedure vests in the Commission's staff gives the staff "*effective* power", in Chief Justice Burger's words, to impose its subjective likes and dislikes on the populace. There could hardly be a more clear-cut example of the type of regulation doomed by *Hynes* and *Goguen*. See also, *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969)

In *Shuttlesworth*, the Court invalidated a parade permit statute which required the City Commission

to grant the permit "unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." Mr. Justice Stewart, writing for the Court held:

> "There can be no doubt that the Birmingham ordinance . . . conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade', 'procession' or 'demonstration' on the city's streets or public ways. . . . This ordinance . . . therefore fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority is unconstitutional." *Id.* at 150.

The Commission's offer of an advance ruling on whether its staff believes a leaflet is "controversial" is precisely the type of standardless licensing which *Shuttlesworth* forbids.

In *First National Bank of Boston v. Bellotti, supra,* Mr. Justice Powell noted that a Massachusetts statute which forbade corporations from speaking on issues which did not "materially affect" the business of the corporation violated the void for vagueness doctrine. 435 U.S. at 785, n. 21. The "controversial" standard chosen by the Commission is even vaguer than the language deemed insufficient by Mr. Justice Powell in *First National Bank*. No reference to a chaotic and poorly reasoned body of administrative decisions dealing with accounting practices can cure

the vice inherent in the Commission's vaguely worded prohibition. Viewed in its most favorable light, the vagueness of the Commission's standard vests Commission employees with virtually standardless discretion to decide whether a given issue is "controversial". Such standardless discretion, even if exercised in good faith, renders the regulation unconstitutional.

In 1975, LILCO enclosed a bill insert informing residents of the Long Island community of the existence of the Federal Food Stamp Program. To this day, despite the assurances of the Commission, it remains impossible to know whether a similar Food Stamp insert would violate the Commission's ban.[22] Given the inherently subjective nature of the "controversiality" standard adopted by the Commission, it lies solely within the Commission's discretion to permit or to forbid the dissemination of the Food Stamp insert. Such an open-ended grant of power to decide whether a given communication should or should not be permitted is precisely the evil which the "void for vagueness" doctrine is designed to eliminate.[23]

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[22] Although the Food Stamp program enjoys wide support, substantial opposition exists to the concept of Federal subsidies and the manner in which the Food Stamp program is administered.

[23] The Commission's observation that the standard adopted by the Federal Communications Commission in connection with the fairness doctrine is similar to the standard promulgated by the Commission is beside the point. The consequence of falling within the F.C.C. fairness doctrine is more speech. Thus, the fear of arbitrary censorship which animates the void for vagueness doctrine is not present in the context of the fairness doctrine. The consequence of falling within the Commission's ban, however, is the suppression of speech. Thus, the danger of arbitrary censorship is the central vice of the Commission's ban. Instead of looking to the F.C.C. fairness doctrine for guidance, LILCO invites the Court's attention to this Court's clear command that regulation of corporate speech comply with the vagueness doctrine. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785, (1978) n. 21.

CONCLUSION

For the above-stated reasons the decision of the Court of Appeals of the State of New York should be reversed.

Respectfully submitted,

Dated: New York, New York
November 10, 1979

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Appendices

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket No. 77 C 972

LONG ISLAND LIGHTING COMPANY,

Plaintiff,

—against—

THE NEW YORK STATE PUBLIC SERVICE COMMISSION *et al.*,

Defendants.

MEMORANDUM AND ORDER

PRATT, J.:

I. INTRODUCTION

Plaintiff Long Island Lighting Company (LILCO) commenced this action to declare unconstitutional and to enjoin enforcement of orders issued by defendant New York State Public Service Commission (PSC) which prohibit (1) LILCO's promotional advertising of electrical space heating for residential use, and (2) LILCO's use of inserts in its billing envelopes to disseminate its views on the uses and benefits of nuclear energy. The action is brought pursuant to 42 USC § 1983 and its jurisdictional counterpart, 28 USC § 1343(3); the Declaratory Judgment Act, 28 USC § 2201 *et seq.;* and the first and fourteenth amendments. Jurisdiction of a federal question is also alleged under 28 USC § 1331(a), the rights at issue allegedly being valued in excess of $10,000.[1]

[1] Since 42 USC § 1983 is a sufficient predicate for jurisdiction under 28 USC § 1343(3), the direct constitutional claims

By memorandum and order dated August 31, 1977, the court permitted certain organizations and individuals to intervene, pursuant to FRCP 24(b), as parties defendant, but solely with respect to the issues involving the bill inserts. LILCO now moves, pursuant to FRCP 65, for a preliminary injunction, or in the alternative, for summary judgment pursuant to FRCP 56. PSC cross-moves to dismiss the action, based on the Johnson Act, 28 USC § 1342.

For purposes of the summary judgment motion, LILCO has conceded the existence of certain material facts alleged by the defendants to be in dispute, although the latter assert that even with such concessions, some material issues of fact remain. Nonetheless, as more fully explained below, the court determines that there are no disputed facts which are material to the dispositive issues.

II. Background and Nature of the Action

A. *The Parties.*

LILCO, a New York corporation, is a public utility engaged in the business of generating and supplying electrical and gas energy to approximately 900,000 residential and commercial customers in the counties of Nassau, Suffolk, and parts of Queens.

PSC is the public authority charged, pursuant to Article IV of the New York Public Service Law, with general powers of supervision and regulation over the activities of gas and electric utilities. See NY Pub. Serv. Law §§ 65, 66.

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asserted under 42 [sic] USC § 1331(a) and the first and fourteenth amendments are disregarded. See *Monell v. Dept. of Social Services*, ___ US ___, 98 SCt 2018 (1978); *Turpin v. Mailet*, 579 F2d 152 (CA2 1978), *judgment vacated*, 47 USLW 3368 (US Nov. 27, 1978), *modified on remand*, 47 USLW 2474 (CA2 Jan. 16, 1979) (en banc).

Intervenors are several individuals and non-profit organizations involved in the dissemination of information on nuclear power issues. Members of the organizations and the individual intervenors are customers of New York utilities, including LILCO, and have been recipients of bill inserts expressing views with which they disagree.

B. *PSC's Policy and Orders.*

In 1973 PSC gave notice of a proposal to issue an order restricting certain uses of electric energy. Prompted by a critical shortage in fuel oil available to generate electricity in the state, PSC proposed a variety of energy saving steps, invited written comments on its proposals, and required each utility to publish the proposals immediately. In addition, PSC ordered that "all electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising * * *". LILCO did not then challenge that prohibition on advertising; instead, it complied with the order by ceasing to advertise electric space heating, a method of residential heating it had actively promoted for a number of years.

In 1976 PSC undertook a reexamination of the subjects of advertising by utilities and the promotion of electricity sales, and after receiving comments on the proposed position, it adopted on February 25, 1977 a "Statement of Policy on Advertising and Promotional Practices of Utility Companies" (Policy Statement). As part of that statement PSC concluded "that the existing ban on promotion of electricity sales should be continued."

Simultaneously with the policy statement, the commission issued an "order implementing certain restrictions on utility advertising" in which it ordered that

> All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy.
>
> PSC order issued 2/25/77; Ex. III to complaint.

Several public utilities petitioned for rehearing, and on July 14, 1977, PSC issued its order denying those petitions.

On first amendment grounds, LILCO challenges both PSC's continued absolute prohibition against a utility's advertising to promote the use of electrical energy, and its order forbidding the use of bill inserts to present views of LILCO's management on "controversial issues of public policy." LILCO was and is directly affected by both bans, because it wishes to resume its promotion of electric space heating for residences, and it wishes to resume use of bill inserts as a means of promoting management's views on nuclear power, an issue of public policy that concededly is controversial, particularly on Long Island where LILCO is now engaged in planning and constructing two nuclear powered generating stations.

C. *State Court Proceedings.*

After this action was begun, other New York public utilities commenced two Article 78 proceedings in the New York State Supreme Court, Albany County, challenging the same two aspects of the 1977 policy statement and order that are at issue here. In separate decisions dated February 17, 1978, Judge Miner upheld PSC's ban on promotional advertising, but invalidated the ban on bill inserts, finding it to be an unconstitutional restriction on commercial speech. In a brief decision dated July 21, 1978, the Appellate Division, Third Department affirmed on the bill insert issue, but reversed on the promotional advertising issue, thus finding both bans to be constitutional and within PSC's statutory authority. Appeals in both cases are now pending before the New York State Court of Appeals.

D. *PSC's Motion to Dismiss.*

PSC's motion to dismiss the action on the basis of the Johnson Act, 28 USC § 1342, is denied. That statute de-

prives the district court of jurisdiction, under certain circumstances, to "enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency * * *." 28 USC § 1342.

PSC argues that rate issues are involved in both parts of this case in that (1) promotional advertising of electrical energy will eventually cause an increase in rates to consumers, and (2) using bill inserts to promote nuclear energy requires ratepayers to subsidize part of the mailing cost. Thus, according to PSC, both of the challenged orders are based on its rate-making responsibilities.

The Johnson Act "proscribes federal court injunctions of orders affecting public utility *rates*", *United States v. Public Service Com'n.*, 422 F Supp 676, 678 (D Md. 1976) (emphasis in original). While it has been considered that the act's prohibition "is not avoided by basing the action on the civil rights provisions of 28 USC § 1343(3) and 42 USC § 1983", *Klotz v. Consolidated Edison Co. of New York, Inc.*, 386 F Supp 577, 584 (SDNY 1974), it has also been held that "[t]he Johnson Act does not apply to [a] civil rights complaint" that attacks a public electric utility's credit policy, without challenging its electric rates. *Cody v. Union Electric Company*, 545 F2d 610, 611 (CA8 1976). As in *Cody*, the action here does not challenge any rates set by PSC; rather, the complaint alleges that PSC's orders violate LILCO's civil rights under 42 USC § 1983 and the first amendment. Such allegations, if proved, "justify federal remedial action". *Id.* at 612.

The relationship between PSC's orders and public utility rates in New York is indirect, remote, even debatable. Essentially, PSC argues that the effect of these activities, if not proscribed, would be to increase the cost of electricity and thereby force a change in public utility rates. But virtually all that PSC does has similar potential effects on the cost of services, and the Johnson Act was not intended to immunize all public utility activity from federal court injunctions; instead, it prohibits review only of "any

order affecting rates." To fall within the Johnson Act's prohibition, therefore, a challenged order must more directly affect rates than do the ones here under attack. Accordingly, PSC's motion to dismiss is denied.

III. Commercial Speech

Before addressing the two main issues of the case, the court must first consider the role of commercial speech under the first amendment. Until recently the first amendment's protection of commercial speech was severely limited. See, *e.g.*, *Valentine v. Chrestensen*, 316 US 52 (1942). In a series of cases decided since 1974, however, commercial speech has received extensive consideration and analysis, and its protection under the first amendment has been greatly expanded.

In *Bigelow v. Virginia*, 421 US 809 (1975), the Supreme Court stated: "[commercial] speech is not stripped of First Amendment protection merely because it appears in that form." *Id.* at 818. In that case, the Court balanced the first amendment interest against the government interest allegedly served by a regulation making it illegal to sell or circulate any publication encouraging or promoting the processing of an abortion. Holding the statute to be an unconstitutional infringement of the first amendment, the Court noted:

> We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit. Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. * * * To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the government interest alleged. Advertising

> is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.
>
> *Id.* at 825-26 (citations and footnotes omitted).

That commercial speech is entitled to first amendment protection was confirmed in *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council*, 425 US 748 (1976), where the Court held unconstitutional a state ban on advertising the prices of prescription drugs, concluding that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.* at 773.

First amendment protection for commercial speech has been reiterated and reaffirmed in still more recent cases. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 US 85 (1977), the Court struck down a local ban on the posting of "For Sale" signs on residential property, holding that the ordinance in question impaired the flow of truthful and legitimate commercial information to residents. In *Carey v. Population Services International*, 431 US 678 (1977), the Court struck down a ban on advertising contraceptives because the information was a matter of substantial individual and societal interest. In *Bates v. State Bar of Arizona*, 433 US 350 (1977), the court struck down an absolute ban on lawyer advertising, holding that such commercial speech "serves individual and societal interests in assuring informed and reliable decision making", *id.* at 364, and is, therefore, entitled to constitutional protection.

Most recently in *First National Bank of Boston v. Bellotti*, ___ US ___, 98 SCt 1407 (1978), the Supreme Court addressed a matter of collateral concern here, the first amendment rights of a corporation, and flatly rejected the proposition that speech by business entities is

not protected by the first amendment. Invalidating a statute that prohibited a corporation from spending corporate funds in order to disseminate views on state referenda whose issues were not materially related to the company's business, the Court noted that:

> [i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It [discussion of governmental affairs] is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.
>
> *Id.*, 98 SCt at 1416.

Thus, simply because LILCO is a public utility corporation does not deprive it of all first amendment rights.

To determine the constitutionality of the challenged bans on LILCO's communications, the court must balance the first amendment interests asserted by LILCO against the government interests claimed to be served by PSC's orders. See *Bigelow v. Virginia, supra,* 421 US at 826; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra; Linmark Associates, Inc. v. Township of Willingboro, supra.* The balancing analysis must be applied separately to PSC's prohibitions against promotional advertising and controversial bill inserts.

IV. PSC's Ban on Promotional Advertising of Electrical Energy

A. *Factual Background.*

There are three principal methods of home heating available to consumers on Long Island: oil fired space heating, natural gas fired space heating, and electric space heating. Limitations on the supply of natural gas effectively limit the choice to oil and electricity.

LILCO experiences broad seasonal fluctuations in the demand for electrical power; demand increases during the

summer months, attributable to air conditioner use, and decreases during the winter months. As a result, part of the generating capacity that LILCO requires to satisfy summer demand is not utilized during winter months when demand is lower.

To offset some of the fixed costs associated with owning and operating generating facilities all year, and thereby to use its generating facilities more efficiently, LILCO has in the past sought to stimulate electrical consumption during the winter months by advertising the advantages of electric space heating for residential use. Since almost all of LILCO's electrical generating capacity consists of oil fired generating stations, an increase in demand for electrical energy would increase the amount of oil required to generate it.

When the 1973 embargo on oil shipments from the Middle East to the United States caused a domestic oil shortage, PSC sought to limit the demand for electricity by forbidding all promotional advertising by utilities. LILCO complied with PSC's 1973 order and ceased its promotional advertising of electric space heating. Despite contentions that there was no longer a shortage of oil and that oil supplies were sufficient to serve current as well as additional customers of electrical energy, PSC in its 1977 Policy Statement and accompanying order continued its ban on promotional electricity advertising.

In continuing the ban, PSC noted that its highest priority was conservation of energy resources. It reasoned that increased off-peak generation of electricity consumes valuable energy resources and, if it is the result of increased sales, necessarily creates incremental air pollution and thermal discharges to waterways. Moreover, since most of the major utility companies use oil fired generating facilities, any increase in off-peak generation would aggravate the nation's already unacceptably high level of dependence on foreign sources of oil supply. PSC believed "that a continued proscription of promotion of electric sales will result in some dampening of unnecessary

growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales." 1977 Policy Statement at 5.

In short, PSC continued its ban on promotional advertising of electricity in order to reduce consumption of electricity and other energy resources. PSC did, however, permit public utilities to advertise time-of-day rates as a means of encouraging shifts of electrical energy consumption from peak to off-peak times, without increasing aggregate sales, and it indicated that should there be a sufficient change in conditions it would from time to time reexamine its ban on promotional advertising of electrical energy.

Although it may not advertise electric heat, LILCO is permitted to provide advice and information to any individual who requests such information. Moreover, PSC has not barred public utilities from advertising the merits of gas fired space heating, nor does it restrict advertising for oil fired space heating, since PSC has no jurisidiction over oil dealers.

Without conceding their truth, LILCO has assumed the following allegedly material facts solely for purposes of the motion for summary judgment:

> 1. That electric space heating consumes more oil than oil fired space heating;
>
> 2. That electric space heating is ecologically less desirable than oil fired space heating;
>
> 3. That promotion of electric space heating may cause a general rise in the demand for electricity; and
>
> 4. That there is substantial difficulty in establishing a pricing structure for electric space heating service which accurately reflects the marginal cost of providing such service to each consumer.

PSC urges, however, that other allegedly material facts are in dispute and prevent summary judgment. First, PSC asserts that LILCO's concession on pricing structure is limited only to electric space heating, when the issue is whether the rates charged for *all* electric service can be based on an economically efficient pricing structure which would also adequately reflect the marginal costs of electric production for all consumers of electricity. Second, PSC contends that promotion of electric space heating will lead to greater use of heat pumps, which will in turn produce an increase in the peak-time (summer) consumption of electricity due to increased use of air conditioning. Finally, PSC claims there is a factual issue as to whether increased electric production by LILCO would result in increased use of energy inefficient gas turbines, the costs of which would be passed on to all of LILCO's customers, not just those who use electric space heaters.

These factual issues raised by PSC are more appropriate to a PSC proceeding involving the merits of electric heat or a proper pricing structure for electric heat rates. They are not material to a decision on LILCO's first amendment challenge to PSC's flat ban on all promotional advertising of electrical energy. The issue is not whether PSC may directly prohibit or restrict the use of electric heat, but whether PSC may attempt to do so by preventing public utilities from truthfully advertising its advantages. On this issue the merits or demerits of electric heat are simply not material.

B. *Discussion.*

To decide this issue, the court must assess LILCO's and the public's first amendment interests in the free flow of information contained in the advertising, and then determine whether such interests are outweighed by the public interests allegedly served by the ban on such advertising. See *Bigelow v. Virginia, supra,* 421 US at 826; *Metpath, Inc. v. Imperato,* 450 FSupp 115, 117 (SDNY 1978).

To begin with, LILCO has an obvious economic interest in promoting the use of electrical energy and in advertising the availability of its services for electric space heating. That its interest is economic does not deprive it of first amendment protection. See *Bates v. State Bar, supra*, 433 US at 363-64; *Virginia State Board v. Virginia Citizens, supra*, 425 US at 762-63.

Beyond LILCO's economic interest is the public's interest in the free flow of information on the use of electrical energy for home heating. The consumer has a substantial interest in receiving truthful information on electric space heating. Not only does promotional advertising provide information of general public interest concerning electrical energy, it also assists an individual's economic decisions on the benefits and detriments of electric heat. Choosing among oil, gas, or electric residential heating may significantly affect his budget and daily comfort. Moreover, the public in general has an interest in receiving information on the various methods of heating, in order to utilize energy resources ecologically and efficiently. As explained by Justice Blackmun, writing for the court in *Bates v. State Bar, supra*,

> [t]he listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decision making.
>
> *Bates v. State Bar, supra*, 433 US at 364 (citations omitted).

With respect to promotional advertising, then, "where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Board v. Virginia Citizens, supra*, 425 US at 756.

The next question is whether the interests allegedly furthered by the PSC ban outweigh these first amendment interests.

As reflected in its 1977 Policy Statement, PSC's major reason for continuing its ban on promotional advertising was to curb the increased use of electricity in New York. Additional reasons offered have been the maintenance of an economically stable and efficient electric rate structure and preservation of the environment. PSC's position is clear from its counsel's argument:

> A reversal of the Commission's prohibition on advertising would prohibit the Commission from taking an effective means to curb the growth of electric usage in New York State, a growth that has over the past several years increased costs and rates, consumed expensive foreign oil and increased the environmental impact of public utility operations.
>
> Defendants' Memorandum of Law in Opposition to Motion for Summary Judgment, at 27.

Of course, these are legitimate interests which the state properly may seek to further; but it is the method used, a direct infringement of first amendment interests, that is under scrutiny.

PSC has not sought to limit the use of electricity directly; rather, by suppressing accurate promotional information it is attempting to avoid certain perceived detrimental effects of electric space heating. Although PSC's objectives might properly be achieved through direct regulation of electric space heating or, indeed, of all electrical consumption, PSC is attempting an indirect regulation through the advertising ban, which, by deliberately

inhibiting public awareness of the merits of electric heat, attempts to avoid increased consumption of electricity. This, PSC cannot do, because it is a significant interference with the first amendment. As the Supreme Court has observed,

> * * * it seems peculiar to deny the consumer * * * at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, *we view as dubious any justification that is based on the benefits of public ignorance.*
>
> *Bates v. State Bar, supra,* 433 US at 374-75 (emphasis supplied).

In *Virginia State Board, supra,* a state licensing authority sought to justify a total ban on advertising the prices of prescription drugs sold by pharmacists. The Supreme Court observed:

> The strength of these proffered justifications is greatly undermined by the fact that high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject.
>
> * * *
>
> * * * [T]he State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is

> assumed people will have to the free flow of drug price information.
>
> * * *
>
> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.
>
> * * *
>
> *It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.* Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them * * * in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.
>
> *Virginia State Board v. Virginia Citizens, supra,* 425 US at 768-70 (emphasis supplied) (citations omitted).

PSC has statutory power to regulate the use of electrical energy directly by fixing rates, by approving construction of new generating facilities or expansion of existing ones, or by allocating quantities of energy production. See NY Pub. Serv. Law § 66. But it may not do so "by keeping the public in ignorance" of the entirely lawful use of electric space heating. See *Virginia State Board, supra,* 425 US at 770.

PSC argues that the ban does not suppress information concerning electric heat because LILCO is not prohibited from discussing the topic with anyone who seeks information about it. However, permitting communication to a

customer *if* he inquires, does not save the ban. The fact that the seller could provide information to a prospective purchaser who inquired did not save the bans on advertising lawyer services in *Bates v. State Bar, supra;* on posting "For Sale" signs on homeowners' lawns in *Linmark Associates v. Township of Willingboro, supra;* on advertising prices of prescription drugs in *Virginia State Board, supra;* or on advertising contraceptives in *Carey v. Population Services, supra.* Nor does it save PSC's ban on promotional advertising of electric heat.

PSC also argues that its ban does not unconstitutionally suppress information about electric heat because it does not affect advertising by appliance dealers who sell electric space heating devices. This argument is not persuasive. For one thing, PSC has no jurisdiction over such appliance dealers. In addition, "serious questions exist as to whether the [order] 'leaves open ample alternative channels of communication'". *Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 US at 93. PSC has presented nothing to show that appliance dealers have been advertising electric heat through newspapers, radio or any other media designed to reach a large audience. Its ban thus has the effect of suppressing virtually all truthful information concerning electric heat.

As the Court most recently observed:

> * * * the First Amendment * * * prohibit[s] government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information".
>
> *First National Bank v. Bellotti, supra,* 98 SCt at 1419-20.

Like the statutes and regulations challenged in other cases, PSC's ban on promotional advertising of electricity inhibits the "free flow of commercial information." Although the public interests sought to be served by PSC are important, it is not necessary to suppress protected speech in order to achieve those ends. Since the allegedly harmful consequences of increased usage of electric heat may be regulated by means that are not only more directly related to the results sought, but also less restrictive of LILCO's first amendment rights, PSC's ban on promotional advertising of electricity by public utilities is unconstitutional.

V. PSC's Ban on Controversial Bill Inserts

A. Factual Background.

In order to publicize its belief that "nuclear generated power is the most economical, efficient and socially desirable method of meeting Long Island's need for increased energy", Plaintiff's memorandum at 22, LILCO has at times communicated its views about nuclear power to its customers through the use of bill inserts. LILCO believes that such inserts provide a significant medium for efficiently communicating with its customers at reasonable cost.

There is no claim that LILCO's bill inserts have been false or defamatory, nor is there any dispute that such communications on nuclear power are political in nature, that they must be paid for solely by LILCO shareholders, and that their out-of-pocket costs may not be considered an expense of doing business for rate making purposes.

PSC's ban on the use of such bill inserts had its origin in a complaint filed with PSC by the Natural Resources Defense Council, Inc. one of the intervenors in this case, which sought redress for a similar 1976 Con Edison bill insert that discussed the need for nuclear power development. After investigation and hearing, PSC determined

that bill inserts should not be used to express the opinion of management on "controversial issues of public policy".

In the lengthy policy statement issued on February 25, 1977, PSC explained its reasoning. After summarizing its long-standing position that ratepayers should not bear the expense of advertising which states a utility's position on a matter of public controversy, PSC concluded that such advertising would not be permitted to be included as a bill insert, even when the stockholder pays for it in full. PSC summarized its position as follows:

> Further, we shall not permit advertising on matters of public controversy to be included in the printed material that often accompanies the mailing of consumer bills. We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism. A utility company's mailing list provides an available conduit for the easy dissemination of information, which should be used for the benefit of both the consumer and the company to convey noncontroversial and useful information that will create a better informed public. It should not become a vehicle for dissemination only of the company's views on controversial matters of public policy. Accordingly, we will not permit bill inserts to be used by utility companies for the purpose of advertising their opinions or viewpoints on controversial issues of public policy.
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> 1977 Policy Statement at 10-11

When PSC issued its order denying the petitions of various utilities for rehearing, it considered in greater

detail the bill insert restriction in light of the utilities' first amendment contentions. It pointed out that it had not prohibited the companies from making their views known, that use of the bill insert to publicize a utility's views on matters of public controversy was in PSC's judgment improper "since it gives a utility a unique and undue advantage in publicizing its position" to a "selectively chosen target audience", that "the unique advantage * * * is then transformed into a device for presenting only one side of this issue", and that this confers "an unreasonable advantage on management that unduly discriminates against others who may not share or who oppose the company's views". PSC Order Denying Rehearing, at 6 (July 14, 1977). PSC also focused on the limitations inherent in this "unique medium of communications". Its size and weight should not be so great as to require additional postage, and it can be mailed only once a month, and in many cases, only once every other month.

In PSC's view, bill inserts should be used "*primarily* to convey information that is clearly helpful to consumers" (emphasis supplied), and the prohibition is aimed at preserving that "public interest objective". Moreover, according to PSC, no one else can obtain the "wide captive audience for bill inserts" that is enjoyed by utilities having monopoly franchises conferred by the government. In its view, this aspect makes the utility bill insert medium analogous to the limited spectrum space available for radio and television broadcasting, a consideration that leads to problems of "fairness" and equal time so as to permit organizations with opposing viewpoints an opportunity to disseminate their opinions as inserts in the utility's bill. *Id.* at 7-8. After considering that approach, all PSC members were convinced ultimately "that it would be difficult to administer fairly, and would tend to lessen undesirably the number of bill inserts dealing directly with such useful and uncontroversial information as consumer conservation measures." *Id.* at 8. PSC also noted that the privilege to disseminate utility bill inserts derives

from the privilege of franchise monopoly conferred by the government, and that it can, therefore, be regulated by the government to assure that it is exercised in the public interest.

Solely for the purpose of the summary judgment motion, LILCO has assumed certain facts to be established: (1) that LILCO derives an intangible benefit from the distribution of bill inserts discussing its views on controversial issues, although it contends that no consumer incurs any out-of-pocket expenses attributable to the bill insert program, and, (2) that alternative means of communication, such as newspaper advertising, are available at comparable cost, but that in management's opinion, such alternative means are not as effective a form of expression.[2]

PSC and intervenors argue that there is a factual dispute as to whether LILCO's customers (the ratepayers) are forced to subsidize political views with which they

[2] PSC disputes LILCO's contention that bill inserts are an effective means of communication compared to other methods, but LILCO has acceded to PSC's view for purposes of this motion, so there is no dispute as to this fact. It should be noted, however, that LILCO's position on the relative cost efficiency of bill inserts, compared with other forms of communication to the public, is supported by a PSC ruling that required utilities to use bill inserts to notify customers of prospective rate changes:

> While other methods of notification of rate filings are required by statute and the Commission's rules, the narrative description under discussion should be easier to read and understand and would be provided to all customers directly. *We believe that the bill insert requirement we have proposed should effect a significant improvement in notice to the public at minor cost.*
>
> Petition of Consumer Protection Board, NYS Public Service Commission, Case 26972, at 5-6 (Aug. 10, 1976) (emph. supp.).

Prior to this ruling, utilities were required to use newspaper advertisements to notify customers of proposed rate changes and hearings on such changes. Thus, despite its argument to the contrary in this case, PSC itself has recognized bill inserts as an efficient means of communication.

disagree, or in other words, whether all the costs of bill inserts containing political advertising can realistically be allocated between LILCO's ratepayers and shareholders. PSC claims that cost allocation is difficult for three reasons: first, since bill envelopes are limited in size LILCO would have less space to provide for information related to utility services or energy conservation tips if it provided more space for political messages; second, since the determination of rates is based on past expenses and anticipated increases, LILCO might prevent a loss of earnings stemming from cost allocation of political advertising, by simply spending less on customer service; finally, since rates are also set to insure profits for capital formation, a loss in LILCO's earnings due to cost allocation of political advertising expenses (including such advertising in bill inserts) could be made up by increasing electric rates in order to bring in sufficient income to raise the necessary capital. These arguments about cost allocation, however, are irrelevant to PSC's ban on controversial bill inserts, which was to apply "even when the stockholder pays for it in full." 1977 Policy Statement at 10.

Moreover, PSC has presented no facts to support its contention that, contrary to LILCO's position, costs cannot be allocated between ratepayers and shareholders. See *SEC v. Research Automation Corporation et al.*, 585 F2d 31, 33 (CA2 1978). Indeed, it seems inequitable for PSC to allege a factual dispute that is the result of its own admitted failure to formulate a cost allocation scheme for bill inserts. Nor have intervenors alleged facts to indicate that a fair cost allocation is impossible. On the other hand, LILCO's contention that cost allocation is feasible, is supported by facts. During a three month period in 1977, LILCO employees kept time sheets to determine the extent to which they were engaged in the bill insert process, LILCO's 9(g) Statement, Part B, ¶ 25; a list of hours and allocated salaries, as well as the cost of single sheet and more elaborate bill inserts discussing nuclear power, is also provided. LILCO 9(g) Statement, Part B, ¶ ¶ 25-26.

From these it appears feasible for PSC to allocate the costs of a bill insert so that they may be attributed solely to LILCO's shareholders, and not to its ratepayers.

On the issue of whether bill insert costs can be apportioned, different methods of allocation are possible. One approach would be to charge the shareholders any additional costs of the inserts over and above the costs of mailing the bills to the ratepayers. Another would be just the reverse, that is to charge to the shareholders the full cost of mailing the inserts and envelopes and only incremental costs to the ratepayers for including the bills. A third would be to prorate the costs of the single mailing between the bill and the insert on a basis of space, number of words, or other reasonable manner. In any event, the problem is administrative, not constitutional.

Whatever allocation method might be used, however, to the extent that the cost of an insert is less than the cost of a separate mailing of the same insert, it would represent a benefit or "free ride" to shareholders which had been paid for by ratepayers. Moreover, LILCO concedes that with any method of allocation there would be an intangible benefit from using bill inserts arising out of its access to a prepared mailing list and access to an existing bill stuffing and mailing system.

B. Discussion

1. LILCO and its advocacy of nuclear power are both entitled to some first amendment protection.

In *First National Bank v. Bellotti, supra,* the Supreme Court ruled that corporate speech is entitled to first amendment protection, even when such speech deals with matters unrelated to the corporation's business interests. The thrust of the decision was that in the free discussion of governmental affairs, the nature of the speaker is not constitutionally significant and does not call into question different first amendment considerations. The Court noted

that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual." *Id.,* 98 SCt at 1416.

LILCO argues that the purpose of its communications on nuclear power is to inform customers of the advantages of that form of energy and to reassure customers on management's judgment in pursuing the development of nuclear power. The bill inserts prohibited by PSC seek to discuss the merits of nuclear energy, a matter of current debate and divergent opinion. LILCO's proposed construction of nuclear power plants on Long Island is an issue seriously affecting both individual and community interests; since opponents of nuclear energy have campaigned against the building of such facilities, the controversy has received substantial media attention. Even though LILCO may stand to gain commercially from completion of the nuclear plants, the information it seeks to disseminate is essentially political, and "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 US 64, 78 (1964).

It is clear, then, that debate on nuclear power is the type of speech the first amendment was designed to protect, see *Bellotti, supra,* 98 SCt at 1415, and that LILCO's interest in expressing itself on that issue is entitled to first amendment protection. It remains to be determined whether PSC's prohibition of bill inserts as a vehicle for LILCO's expression on a controversial issue such as nuclear power is an unconstitutional infringement of LILCO's first amendment rights of expression.

2. PSC's ban is not unconstitutionally vague.

LILCO argues that the ban on controversial issues of public policy in bill inserts is unconstitutional because it is vague. The court does not agree. LILCO contends that the alleged vagueness of the PSC ban raises three prob-

lems of constitutional dimension: (1) the ban fails to give adequate notice of the scope of its proscription; (2) the ban has a chilling effect on the exercise of first amendment rights; and (3) the ban vests overbroad discretion in PSC to regulate the content of proposed communications.[3] Under PSC guidelines, a public utility's expenditures for political advertising are recorded in a special "below-the-line" account, number 426.4, which excludes them from consideration as business expenses in the rate making process, thus placing their burden on shareholders rather than ratepayers.[4]

PSC interprets this special cost-allocation account to include

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[3] Extending these contentions, LILCO urges that since the PSC ban "applies only to inserts which discuss 'controversial matters of public policy' and explicitly authorizes 'non-controversial' and 'useful' inserts, [LILCO] is unable to determine whether many inserts fall into the proscribed or encouraged category." Aff. of Ira L. Freilicher, ¶ 13. As an example, LILCO refers to a bill insert discussing the federal food stamp program which had been disseminated prior to the PSC ban. LILCO argues that the food stamp program has been the subject of some controversy, and that under the present PSC ban, it would be impossible to determine whether a food stamp insert would now be deemed "controversial" or "useful". See Freilicher aff., ¶¶ 14-15. As a result, LILCO claims that it would be reluctant to disseminate bill inserts on that topic in the future.

[4] The account description provides:

> This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification or revocation of franchises; or for the purpose of influencing the decisions of public officials or advancing the political objective of the utility, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.
>
> Account 426.4, Expenditures for Certain Civic, Political and Related Activities. 16 NYCRR, Ch. III, Sub. Ch. F.

> All advertising which seeks to sway opinion—legislative, environmental, governmental, consumer or any other kind—to the industry's position on public policy disputes.
>
> 1977 Policy Statement at 10.

PSC has also stated that it would "include in this category expenses incurred in the preparation of materials designed to influence public opinion in the current debate concerning the development of nuclear power." *Id.* The account has existed for some time; it has been the subject of various state court and regulatory decisions interpreting what is meant by "political advertising"; and LILCO has indicated that it will continue to cooperate with the PSC cost-allocation guidelines for Account 426.4. Therefore, since the "controversial issues of public policy" now barred by PSC from bill inserts are those matters whose expenses would ordinarily be recorded in Account 426.4 as political advertising, PSC argues that some guidance does exist for utilities to follow in determining whether or not a particular bill insert falls into the proscribed category.

In its decision denying reconsideration of the policy statement, PSC considered the vagueness argument directly:

> The petitioners * * * argue that the term "controversial issues of public policy" is too vague and does not give them any clear standards by which to judge the content of their bill inserts.
>
> In the [cost-allocation] Guidelines, we discussed the various types of materials that would fall within our proscription. These Guidelines are admittedly general but we expect to give them greater definition through future advisory determination. One such determination was made in our Policy Statement where we specifically included in this category expenses incurred in the preparation of materials

> designed to influence opinion in the current debate concerning the development of nuclear power. In its petition here, Con Edison requested a determination as to whether materials prepared in response to the demand by several elected officials for public operation of its facilities falls within the political category. We believe that it does and, therefore, should not be included as a bill insert. In the event a utility wishes additional guidance with respect to this matter, it should feel free to ask it. We will resolve any request expeditiously so that no undue delay will result.
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> Order Denying Petitions for Rehearing, *supra* at 8-9.

The Supreme Court has stated that:

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.
>
> *Connolly v. General Construction Company,* 269 US 385, 391 (1926).

In the context of the first amendment, the court has further stated:

> We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms * * *"; "[f]or standards of permissible statutory vagueness are strict in the area of free expression. * * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." * * * When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone * * *." * * * For "[t]he threat of sanctions may

> deter * * * almost as potently as the actual application of sanctions."
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> *Keyishian v. Board of Regents,* 385 US 589, 603-04 (1967) (citations omitted).

The Supreme Court thus requires "more specificity of a statute potentially applicable to expression sheltered by the first amendment than in other contexts * * *." Laurence H. Tribe, *American Constitutional Law* 719 (1978). In *Smith v. Goguen,* 415 US 566 (1974), where the Court invalidated as being unconstitutionally vague, a state provision punishing "contemptuous" treatment of the American flag, the Court noted that "[w]here a statute's literal scope * * * is capable of reaching expression sheltered by the First Amendment, the [due process/vagueness] doctrine demands a greater degree of specificity than in other contexts." *Id.* at 573. See also *Grayned v. City of Rockford,* 408 US 104, 108-09 (1972); *Papachristou v. City of Jacksonville,* 405 US 156, 162 (1972); *Lanzetta v. New Jersey,* 306 US 451, 453 (1939).

Even under these high standards it does not appear that the PSC's exclusion of "controversial issues of public policy" from bill inserts is unconstitutionally vague. In context the phrase is a synonym for the "political advertising" for which expenditures are recorded in Account 426.4. Interpretation of what is "controversial" or "non-controversial" may be governed by those considerations which determine expenditures recorded in that account. PSC has already had some expertise, and the public utilities some guidance, on what matters are considered "political" and thus subject to recording in Account 426.4; these interpretations may similarly be used as guidelines in determining what is or is not "controversial".

LILCO also cites *First National Bank v. Bellotti, supra,* to support its vagueness argument. There the Supreme Court found unconstitutional a Massachusetts statute barring corporations from making expenditures designed to influence referenda on questions other than those

"materially affecting" the property, business, or assets of the corporation. Justice Powell discussed the vague and deterrent affect of the statute's "materially affecting" standard:

> Even assuming that the rationale behind the materially affecting requirement itself where unobjectionable, the limitation in [the statute] would have an impermissibly restraining effect on protected speech. Much valuable information which a corporation might be able to provide would remain unpublished because corporate management would not be willing to risk the substantial criminal penalties—personal as well as corporate—provided for in [the statute]. * * * As the facts in this case illustrate, management could never be sure whether a court would disagree with its judgment as to the effect upon the corporation's business of a particular referendum issue.
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> *Id.*, 98 SCt at 1420, n.21 (citations omitted).

LILCO argues that the "controversial issues of public policy" standard used in the PSC ban is even more subjective and amorphous than *Bellotti's* "materially affecting" standard. *Bellotti,* however, is readily distinguishable. The rejected standard of the Massachusetts statute had no prior history of interpretation or guidance from court or administrative opinions, whereas the language adopted by the PSC closely parallels the standard of political advertising attributable to Account 426.4, which does have a history of prior interpretation.

Moreover, as an administrative regulation the PSC restriction lacks the chilling impact of the potential jail sentence imposed by the Massachussets statute. It even bears the promise of the PSC to "expeditiously" resolve in advance any doubt about a particular proposed bill insert. Although the delay caused by even an expeditious administrative review might under some circumstances chill speech sufficiently to render the regulation unconstitutional, that is not the case here, where the affected speech lacks spontaneity and is prepared for inclusion in the monthly billing envelope.

Thus, the ban is not unconstitutional on grounds of vagueness.

3. PSC's ban does not otherwise infringe LILCO's first amendment rights.

In its order denying rehearing, PSC stated:

> We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to purchase space in newspapers, and to speak before public gatherings. For these kinds of communications, we merely require that the companies, rather than their customers, bear the costs.
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> Order Denying Petitions for Rehearing, *supra* at 10.

Thus, PSC's order is not an absolute ban but rather, a restriction on one method of communication, a distinction that the Supreme Court has stated "is not without significance to First Amendment analysis since laws regulating the time, place or manner of speech stand on a different footing than laws prohibiting speech altogether." *Linmark v. Township of Willingborough, supra,* 431 US at 93.

The Supreme Court has

> * * * often approved [time, place, or manner restrictions] provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.
>
> *Virginia State Board v. Virginia Citizens, supra,* 425 US at 771.

See also *Grayned v. City of Rockford, supra,* 408 US at 115-17; *Buckley v. Valeo,* 424 US 1, 17-18 (1976).

However, PSC's prohibition against using bill inserts to express management's views on "controversial issues of public policy" does not fit nicely into the category of a time, place, or manner restriction. As *Virginia State Board, supra,* teaches, three tests must be met before speech may be restricted under that analysis. Two are clearly met here; but the analysis breaks down on the third.

One test that is clearly met here is the requirement of ample alternative channels for communication. As already indicated, PSC has not prohibited utilities from urging nuclear power or other positions of a controversial nature; it has merely deprived them of the bill insert means for expounding their views. All other means of communicating with the public—newspaper advertisements, public speakers, or even house-to-house canvassing—are unaffected by the bill insert ban. Although LILCO may feel that no other approach is as effective or efficient as would be the use of bill inserts, the fact remains, nevertheless, that for communicating its views LILCO has available to it ample alternative channels, indeed all those channels that are available to virtually anyone else in our society who wishes to impress the public with a point of view. LILCO, in other words, is surely no worse off than other would-be communicators.

The second test which has been met here is that the restriction serve a significant governmental interest. PSC best summarized its justifications at pages 6 to 8 of its July 14, 1977 Order Denying Petitions for Rehearing. There, PSC expressed its belief that permitting utilities to use bill inserts to discuss controversial issues would confer an undue advantage on management, and would interfere with the primary function of bill inserts, namely to convey information that is clearly helpful to consumers. The types of information that PSC viewed to be properly distributed at ratepayers' expense, and therefore

presumably appropriately includable in bill inserts, were elsewhere described by PSC as including

> appeals for the conservation of gas or electricity; notification of emergency conditions and procedures; instructions in the proper use of the equipment which makes use of the utility's service; information about new rates, new billing practices, or new inspection or meter reading schedules; advice concerning hazards associated with the utility's service; reports on matters of interest to the public concerning the utility's service—such as service difficulties and progress in overcoming them, projections of new capacity additions, plans for new or improved means of providing service, and the like.
>
> 1977 Policy Statement at 11.

PSC viewed the inserts as directed to a wide captive audience that must open the bill and be exposed to the inserts. From this, PSC reasoned that a degree of fairness or equal time for proponents of opposing views would have to be required and that this, in turn, would not only be difficult to administer fairly, but also would tend to lessen undesirably the number of bill inserts dealing with such useful and uncontroversial information as consumer conservation measures. These are significant governmental interests properly to be weighed by PSC in regulating utilities.

The third test for a valid time, place, or manner restriction, however, is missing here, for it cannot be said that PSC's ban on use of bill inserts to express views on "controversial issues of public policy" is unrelated to the content of the regulated speech. Indeed, it is precisely because of content—controversial issues—that LILCO has been denied access to bill inserts as a medium for advocating nuclear power. The discussion does not end, however, just because the content of LILCO's speech causes its regulation, or because the PSC ban does not fit

the classic mold of a time, place or manner restriction. A content based restriction was upheld by the Supreme Court in *Lehman v. City of Shaker Heights*, 418 US 298 (1974), in which the Court affirmed a judgment of the Supreme Court of Ohio, that held there was no violation of Lehman's first and fourteenth amendment rights when the city refused to permit the display on vehicles of the city transit system of posters advertising Lehman's candidacy for public office. The city had acted under a policy which permitted commercial advertising on its vehicles, but prohibited any "political advertising". Under that policy the city had not accepted or permitted any "political or public issue advertising." Lehman urged in the Supreme Court that the car cards constituted a "public forum" entitled to first amendment protection regardless of their primary purpose.

Four justices disagreed with Lehman, distinguishing the advertising in public transit vehicles "from the traditional settings where First Amendment values inalterably prevail." 418 US at 302. Writing for the prevailing four, Justice Blackmun noted that American constitutional jurisprudence has been jealous to "preserve access to *public places* for purposes of free speech," but he nevertheless reminded us that "the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question." *Id.* at 302-03 (emphasis supplied). Then, stressing the difference between car card space as an incidental aspect of public transportation and free speech in open spaces, in a meeting hall, in a park, on a street corner, or in a public thoroughfare, he turned his attention to whether the city's policies and practices governing access to the transit system's advertising space were arbitrary, capricious or invidious. He found they were not, because potential revenues could be jeopardized by requiring short term political advertisements, because users would be subjected to the blare of political propaganda, because "there could

be lurking doubts about favoritism," and because "sticky administrative problems might arise in parcelling out limited space to eager politicians." Under those circumstances, Justice Blackmun wrote, "the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation." *Id.* at 304.

Summarizing his view, Justice Blackmun concluded:

> No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation. *Id.* at 304.

Justice Douglas cast the "swing" vote when he concurred in the affirmance because he did not believe "that petitioner has any constitutional right to spread his message before his captive audience." *Id.* at 309.

Writing for the four dissenting members of the court, Justice Brennan argued that Lehman's message was unquestionably protected by the first amendment, that by accepting commercial and public service advertising the city had voluntarily established a forum for communication, and that once a public forum has been established, discrimination-based *"Solely* upon subject matter or content" is prohibited. *Id.* at 316 (emphasis in original). Justice Brennan rejected the distinction between commercial and political advertising because "subject matter or content censorship in any form is forbidden", *id.* at 317, and he found it impossible to draw with accuracy either "the line between ideological and non-ideological speech" or a "manageable line between controversial and non- controversial messages." *Id.* at 319-20. Nor did he accept the

avoidance of "lurking doubts about favoritism" as a justification for excluding political ads when commercial ads were permitted.

Lehman was a close case, perhaps because content restrictions are not favored by the courts. Contrary to LILCO's argument, however, they need not always be justified by state interests that are "compelling". *Lehman* shows that if there is no public forum, then reasonable governmental restrictions on speech may be sustained provided they are not arbitrary, capricious, or invidious. Cf. Tribe, *supra* at 692-93. Such restrictions were upheld in *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F2d 471 (CA2 1976), where the court concluded that school mailboxes, bulletin boards and meeting rooms are not public fora required to be made available to a minority union. And in *Buckel v. Prentice*, 410 F. Supp 1242 (SD Ohio 1976) a school's distribution to parents, via students, of information concerning coming theatrical events, home safety measures and the like, did not establish the "child messengers" as a public forum for first amendment purposes. The court there found that dissemination of such material was a logical and proper extension of the educational function of schools and that it did not "give rise to any right of access to student distribution by parents or other concerned citizens." 410 F. Supp at 1247.

Comparing *Lehman*, itself, with the present case we find many parallels and a few significant differences. In virtually all respects, however, PSC's position is stronger than was that of the City of Shaker Heights.

a. In both cases, there were ample alternate forums available to the speaker.

b. The government's restriction was against "political or public issue advertising" in *Lehman*, and against "controversial issues of public policy" here. Both are content based restrictions aimed at closing the medium to political or controversial messages. However, Justice Brennan's difficulty in finding a manageable line between controversial and non-controversial messages in *Lehman* may be resolved here through the existing interpretations on cost allocation and the expeditious review procedure promised by PSC.

c. In *Lehman*, the advertising space was owned and regulated by the city, but was offered generally to the public for commercial use. LILCO's mailing envelopes are, of course, owned by LILCO, but regulated by PSC. Historically, LILCO's bill inserts have been messages generated either by LILCO or by PSC, and have not been available for use by the general public at all.

d. Neither the advertising cards on Shaker Heights' busses nor LILCO's bill inserts constitute one of "the traditional settings" where, as Justice Blackmun observed, "First Amendment values inalterably prevail." 418 US at 302. As with the car cards, LILCO's bill inserts involve "no open spaces, no meeting hall, park, street corner, or other public thoroughfare."

e. LILCO is engaged in the commercial activity of providing gas and electric service to the public. Its primary obligation is to provide efficient, economical utility service to Long Island residents under a monopoly franchise that is regulated in the public interest by PSC. Charges for its services are summarized in bills that are mailed in envelopes. From time to time, additional messages to the energy consumer have been included in the bill envelope. At times PSC has required certain messages to be brought to the consumer's attention by that means, and at other times, LILCO has sought to communicate with its consumers directly through the bill inserts. Clearly, what may be included in the billing envelopes is incidental to the basic service functions of both LILCO and PSC, just as providing car card space was incidental to Shaker Heights' function of providing public transportation.

f. In *Lehman*, a major point of difference between Justices Blackmun and Brennan was the former's view that the car cards were not a public forum, and the latter's conclusion that the city's own actions had turned the car cards into a public forum. PSC here, by this very regulation, is helping to prevent the bill inserts from becoming a public forum that would subject them to the strict scrutiny necessary for constitutional operation.

g. Shaker Heights' justifications for prohibiting political or public issue messages on its car cards were that the limitation on access to the advertising space would minimize (1) chances of abuse, (2) the appearance of favoritism, and (3) the risk of imposing upon a captive audience. All were accepted by Justice Blackmun as reasonable legislative objectives. Essentially similar justifications have been offered by PSC for keeping controversial issues of public policy out of utilities' bill inserts: (1) the risk of imposing on a captive audience, (2) the appearance of favoritism toward utilities' views on controversial issues, (3) the difficulties inherent in counteracting that appearance by permitting other points of view, and (4) the inevitable charges of improper conduct when PSC is placed in the position of an arbiter of fairness on controversial views, many of which may be far removed from matters of utility management and regulation.

In addition to the foregoing, however, PSC has two more justifications to add to its side of the balance. It seeks to protect the bill insert medium from over-use so that it may be preserved for important and useful information which PSC deems necessary for the consumer to use the utilities' services efficiently, economically and safely. In addition, PSC clearly seeks to avoid making a "public forum" out of the bill inserts, and thereby to steer clear of the issue that so sharply divided the Court in *Lehman*. As the Supreme Court found in *Police Department of Chicago v. Moseley* 408 US 92, 96, 92 SCt 2286,

2290 (1972), "once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." Since substantial constitutional and administrative consequences would flow from a determination that a particular medium of communication qualified as a "public forum", surely PSC may limit use of the billing mechanism so that it does not become such a forum. In this way PSC could avoid being enmeshed in a wide variety of issues and considerations that are not directly related either to the regulatory responsibilities of PSC or to the business of the utilities it regulates.

In short, on this issue, the Supreme Court in *Lehman* upheld against a first amendment challenge a governmental prohibition against "political and public issue advertising" on rapid transit vehicles. *A fortiori*, PSC's ban of "controversial issues of public policy" from the bill inserts of New York public utilities does not infringe the first amendment.

VI. Conclusion

On the promotional advertising issue, LILCO is entitled to judgment (a) declaring that the Statement of Policy on Advertising and Promotional Practices of Public Utilities, issued by defendant PSC on February 25, 1977, and all subsequent implementing orders of the PSC, to the extent that they prohibit plaintiff LILCO from truthful promotional advertising of electric space heating, violate the first amendment and are, therefore, unconstitutional, and (b) enjoining PSC from enforcing the prohibition.

On the bill insert issue, PSC and the intervenor defendants are entitled to judgment declaring that the portion of the order issued by PSC on February 25, 1977 that reads "all utilities subject to the jurisdiction of this Com-

mission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy," does not infringe LILCO's rights under the first and fourteenth amendments to the United States Constitution.

The Clerk shall enter judgment accordingly.

SO ORDERED.

Dated: Westbury, New York
March 30, 1979.

/s/ GEORGE C. PRATT
GEORGE C. PRATT
U. S. District Judge

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

77 C 972

LONG ISLAND LIGHTING COMPANY,

Plaintiff,

—against—

THE NEW YORK STATE PUBLIC SERVICE COMMISSION; ALFRED E. KAHN, as Chairman of the New York State Public Service Commission; EDWARD BERLIN, as Deputy Chairman of the New York State Public Service Commission; and HAROLD A. JERRY, JR., EDWARD P. LARKIN, CARMEL CARRINGTON MARR, ANNE MEAD and CHARLES A. ZIELINSKI, Members of the New York State Public Service Commission,

Defendants,

SCIENTISTS' INSTITUTE FOR PUBLIC INFORMATION, NATURAL RESOURCES DEFENSE COUNCIL, INC., FRIENDS OF THE EARTH, CONSUMER ACTION NOW, JOAN MCCALL and SUSAN MAINWARING,

Intervenors.

JUDGMENT

A memorandum and order of Honorable George C. Pratt, United States District Judge, having been filed on March 30, 1979, declaring that the Statement of Policy on Advertising and Promotional Practices of Public Utilities issued by defendant THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) on February 25, 1977, and all

subsequent implementing orders of THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) to the extent that they prohibit plaintiff LONG ISLAND LIGHTING COMPANY (LILCO) from truthful promotional advertising of electrical space heating, violate the first amendment and are, therefore, unconstitutional, and, further, enjoining THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) from enforcing the prohibition;

And aforesaid memorandum and order, also declaring, on the bill insert issue, that the portion of the order issued by THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) on February 25, 1977, that reads "all utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy," does not infringe plaintiff LONG ISLAND LIGHTING COMPANY's (LILCO) rights under the first and fourteenth amendments to the United States Constitution, it is

ORDERED and ADJUDGED that plaintiff LONG ISLAND LIGHTING COMPANY (LILCO) have judgment declaring that the Statement of Policy on Advertising and Promotional Practices of Public Utilities, issued by defendant THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) on February 25, 1977, and all subsequent implementing orders of THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC), to the extent that they prohibit plaintiff LONG ISLAND LIGHTING COMPANY (LILCO) from truthful promotional advertising of electric space heating, violate the first amendment, and are, therefore, unconstitutional, and that defendant THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) is enjoined from enforcing the prohibition;

IT IS FURTHER ORDERED and ADJUDGED that defendant THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC)

and the intervenor defendants have judgment declaring that the portion of the order issued by THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) on February 25, 1977 that reads "all utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy," does not infringe plaintiff LONG ISLAND LIGHTING COMPANY's rights under the first and fourteenth amendments to the United States Constitution.

Dated: Westbury, New York
March 30, 1977

/s/ _____
Clerk

/s/ _____
Deputy Clerk

Approved:

/s/ GEORGE C. PRATT
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

77 Civ. 972

LONG ISLAND LIGHTING COMPANY,

Plaintiff,

—against—

THE NEW YORK STATE PUBLIC SERVICE COMMISSION *et al.*, *Defendants,*

MEMORANDUM AND APPEAL

PRATT, J:

Defendant New York State Public Service Commission (PSC) has moved, pursuant to FRCP 52(b), for the court to amend or make additional findings of fact in connection with the memorandum and order of March 30, 1979, declaring that PSC's ban on New York utilities' promotional advertising of electric space heating violates the first amendment. In addition, PSC seeks a stay of the court's order pending determination of the Rule 52(b) motion and appeal. Plaintiff Long Island Lighting Company (LILCO) opposes PSC's motion and the request for a stay.

As grounds for the Rule 52(b) motion, PSC argues that the court, in its March 30, 1979 opinion, "omitted or misconstrued certain material facts supporting state interests" that PSC had alleged. Specifically, PSC asserts (1) that the court, did not account for the constant availability of base load generating facilities during the winter

months, and their increased oil usage to generate more electricity; (2) that the court erred in stating that the PSC has not barred utilities from advertising the merits of gas fired space heating; (3) that the court omitted certain factual allegations by PSC concerning the effect of promotional advertising on electric rates; (4) that the court did not address the impact on consumers of improperly structured rates stemming from promotional advertising; and (5) that the court failed to discuss PSC's allegation that promotional advertising of electric space heating would stimulate a general rise in demand for electricity, thereby obstructing efforts by PSC and utilities to conserve energy. PSC also argues that the court was incorrect in concluding that the factual issues raised by PSC are relevant to direct regulation of electric heat, but not to promotional advertising of electric heat.

While PSC argues that the court "omitted or misconstrued" certain facts, the decision reveals that the court assumed, for purposes of the decision, that promotional advertising *would* increase the demand for electricity, *would* require use of more oil to generate the electricity, and *would* have an effect on electric rates. With respect to the claim that there would be an adverse effect on consumers because of rates which had been improperly structured by the PSC, the court assumed that it was within the power of the state, either through the PSC or the legislature, to restructure the rates should that be necessary.

With respect to utility advertising of gas fired heating, the court erred in stating that the PSC has not barred such advertising, but the court does not consider this fact to be dispositive of the underlying issue in this aspect of the case; whether PSC may do indirectly, through a ban on promotional advertising, that which it has thus far chosen not to do directly, that is, restrictions on usage of electricity. Thus, except for the gas advertising ban, each of the "omitted" facts that PSC asserts on this motion was considered by the court and either weighed in

evaluating PSC's interests, or deemed irrelevant or immaterial to a ban on advertising, as opposed to a restriction on use. The Supreme Court decisions relied upon in the March 30 decision make it clear that an otherwise entirely lawful commercial activity may not be regulated indirectly by prohibiting truthful advertising to consumers about that activity.

The factual issues referred to by PSC go to the merits of direct regulation of electric space heating, and, therefore, are not material to a decision on LILCO's first amendment rights in the promotional advertising of such an activity. PSC's motion pursuant to FRCP 52(b) is, therefore, denied, and PSC's request for a stay pending determination of the motion is denied as moot.

PSC seeks, in addition, a stay of the court's March 30, 1979 order pending appeal to the Second Circuit. Under FRCP 62(c), the district court may, in its discretion, stay the effect of an injunction during the pendence of an appeal. The ban of which LILCO complains and now has had invalidated was imposed in 1973. LILCO waited until 1977 to challenge that ban in this action. The questions presented are of significant public importance, and it does not appear that LILCO will suffer any significant injury if its promotion of electric heat is delayed another few months in addition to the five years it took for the issue to be submitted to this court for determination. Accordingly, the request for a stay pending appeal of that portion of the court's judgment which enjoined enforcement of the ban on promotional advertising of electric heat is granted on condition that PSC diligently prosecute the appeal.

Finally, in the court's memorandum and order of March 30, 1979, lines 15-16 on page 5 (Part II, C. State Court Proceedings) is hereby amended to read as follows: "Third Department affirmed on the promotional advertising issue, and reversed on the bill insert issue * * * ."

So Ordered.

/s/ George C. Pratt
George C. Pratt
United States District Judge

Dated: Westbury, New York
April 16, 1979